

Supreme Court, U. S.

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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-

76-887

PEOPLE OF THE STATE OF CALIFORNIA ex rel.  
WILLIAM CAMIL, City Attorney of the City of Duarte,  
California,

Petitioner,

vs.

SUPERIOR COURT OF THE STATE OF CALIFORNIA,  
FOR THE COUNTY OF LOS ANGELES,

Respondent,

BUENA VISTA CINEMA, being a building structure contain-  
ing approximately 3,440 square feet (80' x 43'), located on  
real property commonly known as 1345 East Huntington  
Drive, Duarte, California; STEPHEN E. TILLANDER, d.b.a.  
Buena Vista Cinema; DIVERSIFIED REALTY FUND "A",  
a limited partnership; TITLE INSURANCE AND TRUST  
COMPANY, a California Corporation; DUNN PROPERTIES  
CORPORATION, a California Corporation; JOHN DOES  
1 to 10,

Real Parties in Interest.

PETITION FOR A WRIT OF CERTIORARI TO THE  
COURT OF APPEAL,  
SECOND APPELLATE DISTRICT

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Sun Valley, California 91352  
Counsel for Petitioner

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IN THE  
SUPREME COURT OF THE UNITED STATES

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No. 76-

PEOPLE OF THE STATE OF CALIFORNIA ex rel.  
WILLIAM CAMIL, City Attorney of the City of  
Duarte, California,

Petitioner,

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SUPERIOR COURT OF THE STATE OF CALIFORNIA FOR  
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Respondent,

BUENA VISTA CINEMA, being a building structure  
containing approximately 3,440 square feet (80'  
x 43'), located on real property commonly known  
as 1345 East Huntington Drive, Duarte, Califor-  
nia; STEPHEN E. TILLANDER, d.b.a. Buena Vista  
Cinema; DIVERSIFIED REALTY FUND "A", a limited  
partnership; TITLE INSURANCE AND TRUST COMPANY,  
a California Corporation; DUNN PROPERTIES COR-  
PORATION, a California Corporation; JOHN DOES  
1 to 10,

Real Parties in Interest.

PETITION FOR A WRIT OF CERTIORARI TO THE  
COURT OF APPEAL,  
SECOND APPELLATE DISTRICT

The Petitioner, People of the State of  
California ex rel. William Camil, City Attorney

of the City of Duarte, California, respectfully prays that a writ of certiorari issue to review the judgment by the Court of Appeal, Second Appellate District, denying a petition for a writ of certiorari and/or, in the alternative, mandate in People of the State of California ex rel. William Camil, City Attorney of the City of Duarte, California vs. Superior Court of the State of California for the County of Los Angeles (Buena Vista Cinema et al., real parties in interest), 2d Civ. 49376.

The petition herein is the second petition for writ of certiorari to the U.S. Supreme Court, filed in this cause. On March 1, 1976, this Court denied the first petition for writ of certiorari in People ex rel. Camil, City Attorney of Duarte, California v. Superior Court of California, County of Los Angeles (Buena Vista Cinema et al., real parties in interest), No. 75-820, \_\_U.S.\_\_, 47 L.Ed.2d 348, \_\_S.Ct.\_\_ A copy of the statement of facts which appeared at pp. 5-34 of the first petition is attached at Appendix "A" to this second petition for the benefit of this Court and is incorporated by reference herein.

OPINIONS BELOW

A copy of the minute order of Superior Court Judge Norman Dowds, filed on August 2, 1976, denying petitioner's motion for a preliminary injunction is attached hereto at Appendix "B". A copy of the reporter's transcript of such hearing appears at Exhibit "10" to the Petition for Writ of Certiorari And/Or, in the Alternative, Mandate, With Supporting Memorandum of Points and Authorities.

The Court of Appeal, Second Appellate District, by a 2-1 vote, denied the Petition for Writ of Certiorari And/Or, In The Alternative, Mandate on the original papers and without an opinion. Associate Justice Lynn Compton was of the opinion that the petition for an alternative writ should have been granted. A copy of said order is attached hereto at Appendix "C". The California Supreme Court entered an order, denying the petition for hearing, without writing an opinion. A copy of said order is attached hereto at Appendix "D".

JURISDICTION

The order of the California Supreme Court

denying the petition for hearing was entered on September 29, 1976. The petition for certiorari herein was filed within 90 days of this date. This Court's jurisdiction is invoked under 28 U.S.C. section 1257(3).

QUESTIONS PRESENTED

1. Whether the First and Fourteenth Amendments to the Federal Constitution were intended to oust the Respondent Court of its traditional equity powers to grant interlocutory relief in a public nuisance abatement action such as was presented in the trial court below, where the autoptical evidence is clear and convincing, and uncontroverted, that the real party in interest, (Buena Vista Cinema) has shown hard-core pornographic films continuously and without interruption for the past two years, and where the Duarte City Council has taken official action on behalf of the City to revoke the license of such theater, but predicated such revocation on confirmation by the respondent court in an adversary judicial proceeding.

2. Whether the First and Fourteenth Amendments to the Federal Constitution preclude

the granting of any interlocutory relief upon the conclusion of an adversary hearing on a preliminary injunction, brought as an ancillary proceeding in a civil public nuisance abatement action, which seeks the abatement of a theater which is alleged to have exhibited obscene motion picture films as a regular course of conduct.

3. Whether the First and Fourteenth Amendments to the Federal Constitution preclude the granting of an interlocutory order of "closure" in all public nuisance abatement actions involving theaters which exhibit motion picture films?

4. Whether the judicial system of the State of California by denying the City of Duarte a prompt judicial forum in which to contest the right of the real party in interest to commercially exhibit the hard-core films which appeared in the evidence in support of the motion, has deprived the citizens of the City of Duarte, California, as citizens of the United States of:

A. Due process of law and equal protection of the law; and

B. The police power and "home rule" authority which is inherent in municipal

authority; and

C. One of the fundamental rights essential to the concept of well-ordered liberty; namely, the right to enjoy "common decency" and to live in a community whose public morals, moral values, and environment are free from the illegal, degrading, and corrupting influences of such patently hard-core pornography.

5. Whether the facts specifically pleaded in the complaint and the time-motion studies of 169 motion picture films submitted as proof on the motion for a preliminary injunction, indisputably established the right of the petitioner, City of Duarte, to a preliminary injunction, and confirmation of its license revocation, and whether it was an excess of jurisdiction for the respondent court to refuse to assume jurisdiction and grant such immediate relief as to each of the 169 described pornographic films?

#### CONSTITUTIONAL PROVISIONS INVOLVED

The pertinent provisions of the First and Tenth Amendments to the Constitution are set forth in Appendix "E".

#### STATUTORY PROVISIONS INVOLVED

Chapter 7.5 of the Penal Code of California prohibits the sale, distribution etc. of "obscene matter." Penal Code section 311(a), defining "obscene matter", is printed at Appendix "F".

Sections 3479 and 3480 of the Civil Code of California, containing the provisions defining what constitutes a civil public nuisance, are set forth at Appendix "G".

Section 731 of the Code of Civil Procedure of California, authorizing the City Attorney to prosecute civil public nuisance abatement actions when directed by the City Council, is printed at Appendix "H".

Section 527 of the Code of Civil Procedure of California, containing the provisions relating to the granting of preliminary injunctions, is printed at Appendix "I".

Duarte City Ordinance #398, passed and adopted July 13, 1976, and Duarte Council Resolution #76-28, passed and adopted July 13, 1976, are set forth at Exhibit "2" to the "Petition for Writ of Certiorari And/Or, In The Alternative, Mandate, With Supporting Memorandum of Points and Authorities", on file with this

Court as a part of the record herein, and a photo-reduced copy is attached at Appendix "J" and Appendix "K" to this Petition.

STATEMENT OF THE CASE

For the past two years, the real party in interest herein has been exhibiting hard-core pornographic films at the Buena Vista Cinema, located in a neighborhood shopping center in Duarte, California. During these two years, the City of Duarte has sought, unsuccessfully, to obtain entrance to a judicial forum to contest the legality of that operation on the theories of a public nuisance abatement and declaratory judgment action. A petition for a writ of certiorari was prosecuted to this Court for relief, and the same was denied in William Camil, City Attorney v. Superior Court, et al., No. 75-820, \_\_U.S.\_\_, 47 L.Ed.2d 348, \_\_S.Ct.\_\_ (March 1, 1976). (See "Statement of Facts" in No. 75-820, reproduced herein at Appendix "A" to this petition).

Three days after this Court denied petitioner's first application for a writ of certiorari, the California Supreme Court, as if on signal, handed down its first decision in People ex

rel. Busch, et al. v. Projection Room Theater, et al., 16 Cal. 3d 360, 546 P2. 733, 128 Cal. Rptr. 229, upholding the public nuisance abatement concept, but leaving open the question as to whether "closure" of the premises could be effected "since the U.S. Supreme Court has not yet spoken on this difficult question." See Busch, supra, at page 239.

Approximately three weeks later, this Court refused to grant a hearing to an Alabama case which involved the same problem. In Eugene Sweeton, Chief of Police, City of Huntsville, Alabama v. General Corporation, No. 75-1011, \_\_U.S.\_\_, 47 L.Ed.2d 753, \_\_S.Ct.\_\_ (March 29, 1976), this Court denied a petition for writ of certiorari which requested review of an adverse state court decision on the constitutionality of a "closure" order in a case involving a porno theater. This Court's adverse ruling on the Huntsville petition was given nationwide coverage in the news. Petitioner submits that this court's refusal to examine the "closure" issue in the Sweeton case set off the following chain reaction which resulted ultimately in the decision of the trial court below holding that it had no jurisdiction to grant interlocutory relief to the Petitioner herein.

Three days after the Sweeton decision was announced to the newspapers, the Michigan Supreme Court acted in a public nuisance abatement case which had been under submission for a considerable period of time, and reversed a Michigan Court of Appeals order of "closure" of several porno theaters in Michigan ex rel. Cahalan v. Diversified Theatrical Corp., 396 Mich. 244, 240 N.W.2d 460 (April 1, 1976). Thereafter in the California jurisdiction, on a petition for a rehearing which cited the above precedents, the California Supreme Court realigned itself from its 4-3 posture in the first Busch decision, supra, to a 5-2 posture, vacated its prior opinions, and reversed itself on its previous estimate as to what this Court would ultimately hold on the "closure" issue. See People ex rel. Busch, et al. v. Projection Room Theater, et al., 17 Cal. 3d 42, 550 P.2d 600, 130 Cal.Rptr. 328 (June 1, 1976). The California Supreme Court's indecisive opinion in the second Busch decision, supra, caused the trial court below to reluctantly rule that, under constitutional principles, the Court had no jurisdiction to grant interlocutory relief in such cases. See the reporter's transcript for the August 2, 1976, hearing on the motion

for a preliminary injunction at Exhibit "10" to the Petition for a Writ of Certiorari And/Or, In The Alternative, Mandate, filed in the state court below.

A petition for writ of certiorari in the Busch case was denied by this Court on November 1, 1976 in People ex rel. Van de Kamp v. Projection Room Theater, No. 76-340, \_\_ U.S. \_\_, \_\_ L.Ed.2d \_\_, \_\_ S.Ct. \_\_. All of the reasons stated in said petition to this Court apply equally as well to this petition. Petitioner submits, however, that this Court's denial of a writ therein should not control this case. The California Supreme Court's decision was a narrow ruling on a demurrer, and the ambiguous language regarding the type of relief which might be accorded under federal standards was, at that stage, only dictum.<sup>1/</sup> The statement of facts herein plead a different cause. Here the City has sought and been denied judicial relief

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<sup>1/</sup> In its opinion in Busch, supra, the Court specifically noted that result at p. 339:

"We emphasize that the proceedings now before us remain at the pleading stage. Having determined that plaintiffs' complaint is sufficient to state a cause of action based upon a general nuisance theory, we consider it inappropriate to describe in detail the precise dimensions of the injunctive and other relief which might be suitable in this and the related cases.

for two years. Further, the application for relief is as to a trial court's erroneous application of federal law at a preliminary injunction trial, based upon the ambiguous Busch language (See p. 19, supra.). In addition, if this Court denies review, the City will, in all likelihood, be denied its remedy under the law for all time.<sup>2/</sup>

If this were not bad enough, the defense industry has been able to parlay the second Busch opinion into a broad holding in California trial courts that such summary relief cannot be granted in massage parlor, red light abatement cases involving businesses which are nothing more than simple whorehouses. As a result "confusion abounds" in this area of the law. Compare Mugler v. Kansas, 123 U.S. 205, 210 (1887).

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<sup>2/</sup> The cause will not get to trial for six months to a year, and there is little doubt but that the "artful dodgers", at that point, will either (1) have absconded; see, on remand, Huffman v. Pursue, Ltd., 420 U.S. 492, \_\_\_ U.S. \_\_\_, 43 L.Ed.2d 482, 95 S.Ct. \_\_\_ March 18, 1975); or (2) plead mootness, see, on remand, Marks et al. v. Leis, et al., \_\_\_ U.S. \_\_\_, 43 L.Ed.2d 482, 95 S.Ct. 1200 (April 28, 1975). Further, even if the matter does get to trial, review of the summary relief issue, herein raised, will not reach this Court for several more years, at which time it will be subject to a "mootness" defense.

STATEMENT OF FACTS

Petitioner William Camil, City Attorney of the City of Duarte, California, is the Plaintiff in an action commenced in respondent court, entitled: People of the State of California ex rel. William Camil, City Attorney of the City of Duarte, California vs. Buena Vista Cinema et al., CA 107347, being a Complaint in Equity to Abate A Public Nuisance at 1345 East Huntington Drive, Duarte, California, under sections 3479 and 3480 of the Civil Code of California, having been ordered to bring the same by the City Council of the City of Duarte, pursuant to the authority of section 731 of the California Code of Civil Procedure. For the two-year period commencing on or about June 28, 1974 and continuing uninterruptedly up to and including July 16, 1976, the date of filing of petitioner's (plaintiff's) (third) motion for a preliminary injunction in the respondent court below, real party in interest Buena Vista Cinema has been exhibiting hard-core pornographic motion picture films at that address.

The above described public nuisance action has heretofore been before the California Courts on three petitions for extraordinary relief:

(1) 2d Civ 40526, seeking an order requiring the trial court to vacate its order of December 19, 1976 which had denied a (first) motion for a preliminary injunction and sustained the demurrers to the causes of action pleaded in People of the State of California ex rel. William Camil, City Attorney of the City of Duarte, California v. Buena Vista Cinema et al., Civil Action 107347 and City of Duarte, a Municipal Corporation, and James J. Coughlin v. Buena Vista Cinema et al., Civil Action 107771; (2) 2d Civ 46061, seeking an order requiring the trial court to vacate its order of March 3, 1976 which had denied a (second) motion for a preliminary injunction and had, upon a reconsideration of its original ruling on the demurrers, again sustained the demurrers to the aforementioned causes of action and required the plaintiff to file an amended complaint in CA 107347 predicated upon Civil Code sections 3479 and 3480; and (3) 2d Civ 46869, seeking an order requiring the trial court to vacate its order of April 17, 1975 which placed the defendants' demurrer to the First Amended Complaint in Civil Action 107347 off calendar to await the decision of the California Supreme Court in Busch et al. v. Projection Room Theater, et al., L.A. 30432-

30436. All three petitions were summarily denied.<sup>3/</sup>

Petitioner's First Amended Complaint, which is presently before the Respondent Court, was authorized by Judge Max F. Deutz's ruling on March 3, 1976 (See Exhibit "1" to the "Petition for Writ of Certiorari And/Or In The Alternative, Mandate" filed in the Court of Appeal on August 24, 1976 at page 35, lines 6-22). On April 4, 1975, Real Parties in Interest herein appeared by Attorney Jonathan Lappen and filed a demurrer to the First Amended Complaint and on April 17, 1975, Judge August Goebel placed that demurrer off calendar to await the ruling of the California Supreme Court in People ex rel. Busch et al. v. Projection Room Theater, supra. The demurrer of Real Party in Interest (defendant)

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<sup>3/</sup> See "Statement of Facts" at Appendix "A" to this petition. See also the statement of the chronological facts of this action, set forth at Exhibit "1" to the "Petition for Writ of Certiorari And/Or In The Alternative, Mandate" (being paragraphs I through L, at pp. 1-57 of the above-described third petition for writ of mandate entitled People ex rel. Camil v. Superior Court, 2d Civ 46869). A calendar of those events for the years 1974-1976 is set forth on page 4(a) of the petition for a hearing filed in the California Supreme Court on September 10, 1976, a copy of which is filed with this Court as a part of the record herein.

Diversified Realty Fund "A", to the First Amended Complaint, dated October 24, 1975, was similarly placed off calendar by Judge August Goebel on November 24, 1975. Real Party in Interest (defendant) Dunn Properties was granted an open extension of time in which to appear, on condition that Dunn Properties would waive the 60-day period of C.C.P. 437(c) as to Dunn Properties, and would stipulate that a Motion for Summary Judgment, if filed, might properly include them as defendants.

On March 4, 1976, the California Supreme Court handed down its first decision in People ex rel. Busch v. Projection Room Theater, 16 Cal. 3d 360, 546 P.2d 733, 128 Cal.Rptr. 229. In the majority opinion (Richardson, Sullivan, McComb and Clark), filed on March 1, 1976, the California Supreme Court stated at page 239, in relation to the power of the trial court to grant immediate relief by interlocutory closure and/or injunction:

" . . . The relevant principle derived from the foregoing cases is that, except in extremely limited situations (see United States v. Thirty-seven Photographs, supra, 402 U.S. 363), no injunctive relief, whether temporary or permanent in nature, may

be afforded until defendant has been given a full and fair judicial hearing on the issue of obscenity, and an opportunity to obtain a prompt judicial review of that issue by the state appellate courts.

We express no opinion upon the further question whether the court may, in addition, either close the premises entirely or enjoin further 'obscene' exhibitions regarding materials not yet adjudged obscene. Several cases suggest that such further forms of relief would be appropriate and constitutionally permissible. (See People ex rel. Hicks v. Sarong Gals (1974) 42 Cal.App. 3d 556, 562-563; Bloss v. Paris Township, supra, 157 N.W. 2d 260; Grove Press, Inc. v. Flask, supra, 326 F.Supp. 574, 578-580; Oregon Bookmark Corporation v. Schrunk (D. Ore. 1970) 321 F.Supp. 639; State ex rel. Cahalan v. Diversified Theatrical Corp., supra, 229 N.W. 2d 389, 396-397; United Theaters of Florida, Inc. v. State ex rel. Gerstein (Fla. Ct. App. 1972) 259 So. 2d 210, 212-213, vacated and remanded, 419 U.S. 1028.). Other cases have held that such relief would constitute an invalid prior restraint of presumptively protected

materials (Gulf States Theaters of Louisiana, Inc. v. Richardson (La. 1973) 287 So. 2d 480, 489; Mitchem v. State ex rel. Schaub (Fla. 1971) 250 So. 2d 883, 886-887; New Riviera Arts Theater v. State, supra, 412 S.W. 2d 890, 893-895; Sanders v. State, supra, 203 S.E. 2d 153, 156-157; State ex rel. Little Beaver Theatre, Inc. v. Tobin, supra, 258 So. 2d 30, 32; State ex rel. Ewing v. 'Without A Stitch', supra, 307 N.E. 2d 911, 917-918.) Since the United States Supreme Court has not yet spoken on this difficult question, and since in this posture of the case the issue is not before us, we leave the question open for further consideration." (Our emphasis).

A petition for rehearing was filed by the defendants in that case and the California Supreme Court extended its jurisdiction to act on the same for 90 days.

On June 1, 1976, the California Supreme Court vacated its opinions filed on March 4, 1976, and handed down new opinions in People ex rel. Busch v. Projection Room Theater, 17 Cal. 3d 42, 550 P.2d 600 130 Cal.Rptr. 328, in which a new majority (Richardson, Sullivan and Wright, with McComb and Clark concurring

and dissenting) upheld as against a general demurrer, a cause of action under the general public nuisance statute against a theater which exhibited obscene motion picture films as a regular course of conduct, but omitted that portion of the March 4, 1976 opinion referred to above, and inserted in place thereof the following dictum that the federal constitution and decisions of this Court would not permit interlocutory relief or "closure":

"In the cases at bench, in addition to relief under the Red Light Abatement Act (Pen. Code, §11225 et seq.), plaintiffs seek a preliminary injunction enjoining and restraining defendants 'from conducting and maintaining said premises hereinabove described . . . for the purposes of lewdness and from permitting such acts to take place therein and thereon . . . (and further pray that they) be perpetually enjoined from operating and conducting said premises as a public nuisance.' Both in their briefs and at oral argument plaintiffs have made abundantly clear that, as the prayers of their complaints state, the relief they seek is the abatement and closing down of movie theaters and bookstores exhibiting

and selling films and magazines determined to be obscene. Although we have concluded upon well recognized principles of pleading that plaintiffs' complaints state actionable causes for the enjoining of the exhibition and sale of specific obscene materials, we are satisfied that to grant the relief sought by plaintiffs (i.e. closing down the premises in question) would result in a full and pervasive prior restraint upon the freedom of speech and of the press in violation of the First and Fourteenth Amendments to the United States Constitution. (See Near v. Minnesota (1931) 283 U.S. 697, 711-715, 720; Bantam Books, Inc. v. Sullivan (1963) 372 U.S. 58, 70-71; Freedman v. Maryland, supra, 380 U.S. 51, 57; Carroll v. President and Commissioners of Princess Anne (1968) 393 U.S. 175, 180-181; see and compare Kingsley Books, Inc. v. Brown, supra, 354 U.S. 436; see also Perrine v. Municipal Court (1971) 5 Cal. 3d 656, 664-665; Flack v. Municipal Court (1967) 66 Cal. 2d 981, 985-990, passim.) The Courts of a number of our sister states have similarly held that such prior restraints as here sought

by plaintiffs are constitutionally impermissible. (See General Corporation v. State ex rel. Sweeton (Ala. 1975) 320 So. 2d 668, 675 (plurality opn.); Gulf States Theaters of Louisiana, Inc. v. Richardson (La. 1973) 287 So. 2d 480, 489; Mitchem v. State ex rel. Schaub (Fla. 1971) 250 So. 2d 883, 886-887; New Riviera Arts Theater v. State, supra, 412 S.W. 2d 890, 893-895; Sanders v. State, supra, 203 S.E. 2d 153, 156-157; State ex rel. Little Beaver Theater, Inc. v. Tobin, supra, 258 So. 2d 30, 32; State ex rel. Ewing v. 'Without A Stitch', supra, 307 N.E. 2d 911, 917-918; but see People ex rel. Hicks v. Sarong Gals (1974) 42 Cal.App. 3d 556, 562-563 (117 Cal.Rptr. 24); Bloss v. Paris Township, supra, 157 N.W. 2d 260; Grove Press, Inc. v. Flask, supra, 326 F.Supp. 574, 578-580; United Theaters of Fla., Inc. v. State ex rel. Gerstein (Fla. Ct. App. 1972) 259 So. 2d 210, 212-213, vacated and remanded 419 U.S. 1028 (42 L.Ed. 304, 95 S.Ct. 510).

Thus, in Sanders, the Georgia Supreme Court pointed out that 'One obscene book on the premises of a book store does not make an entire store obscene. The injunc-

tion closing this store and padlocking it as a public nuisance necessarily halted the future sale and distribution of other printed material which may not be obscene, thereby precluding the application of the above procedural safeguards (prior notice and prompt judicial hearing) and creating an unconstitutional restraint upon appellant. This broad result cannot be reconciled with free expression under our Constitution.' (P. 157.)

We are aware of no reported cases authorizing the closing of a bookstore or theater, even after it has been repeatedly determined judicially in a full adversary hearing that all or substantially all of the magazines or films exhibited or sold therein are obscene. Indeed plaintiffs have directed our attention to no such precedents, have presented nothing to countermand or distinguish the authorities referred to above, and at oral argument stated they could find no authority justifying the closing of bookstores in such circumstances. While we have concluded that a court of equity, having determined particular magazines or films

to be obscene, after a full adversary hearing, may enjoin the exhibition or sale thereof by those responsible, we emphasize that the closing of such bookstores or theaters, either temporarily or permanently, or the enjoining of the exhibition or sale on said premises of magazines or films not specifically so determined to be obscene, constitutes an impermissible prior restraint in violation of the First and Fourteenth Amendments to the United States Constitution.

We therefore hold that abatement in the present action must be directed to particular books or films which have been adjudged obscene following a fair and full adversary hearing, rather than against the premises in which the material is sold, exhibited or displayed." (Our emphasis).

A petition for reconsideration and modification of opinion, by the People, was denied on July 15, 1976. A petition for writ of certiorari was denied by this Court on November 1, 1976 in People ex rel. Van de Kamp v. Projection Room Theater, No. 76-340, \_\_ U.S. \_\_, \_\_ L.Ed.2d \_\_, \_\_ S.Ct. \_\_.

On July 13, 1976, the Duarte City Council enacted Ordinance 398, as an emergency measure,

to conform Ordinance No. 369 to the decision of the Court of Appeal in People ex rel. Camil v. Buena Vista Cinema, 57 Cal.App. 3d 497, 129 Cal.Rptr. 315 (Apr. 21, 1976), petition for hearing denied by the California Supreme Court on June 17, 1976. At the same meeting, the City Council considered photographic time-motion studies of 72 motion picture films which had been exhibited at the Buena Vista Cinema during the 8 month period from November 6, 1975 through July 5, 1976 and, pursuant to Ordinance 398, made findings of fact in Resolution 76-28, passed and adopted on July 13, 1976. In Resolution 76-28, the City Council found that each of the 72 films was a lewd film under Duarte Ordinance 398 and that the Buena Vista Theater was a public nuisance, being a place where lewd films were publicly exhibited as a regular course of business. Pursuant to Ordinance 398 and Resolution 76-28, the City Council revoked all licenses and permits which had previously been issued, subject to confirmation by the Los Angeles Superior Court in the judicial proceedings which are required by Ordinance 398 and which were ordered filed by the City Council in Duarte Resolution 76-28. A copy of Duarte Ordinance 398 and

Duarte Resolution 76-28 is attached as Exhibit "2" to the "Petition for Writ of Certiorari And/Or, In The Alternative, Mandate" and at Appendix "J" and "K" to this petition.

Pursuant to the July 13, 1976 directive of the Duarte City Council in Resolution 76-28, Petitioner (plaintiff) on July 16, 1976, served on Real Parties in Interest and filed a motion for a preliminary injunction, as prayed for in the First Amended Complaint on file in the Respondent Court, and noticed the same for a hearing on August 2, 1976, asking for the following relief:

- (1) An interlocutory injunction against the showing of 169 motion picture films named and described in Enclosure "A" to Duarte City Council Resolution 76-28, as programs 1-19 (36 films), programs 20-40 (53 films), and programs 54-88 (78 films);
- (2) A finding of fact, based upon the physical evidence which is before the court (time-motion studies of 169 films) that a public nuisance exists at the Buena Vista Cinema; and
- (3) A finding of fact that the City Council, in applying Ordinance No. 398 to the instant facts, did not act in an unconstitutional

manner when, pursuant to Resolution 76-28, they revoked all licenses and permits theretofore issued to such business, subject to confirmation by the Court.

On July 22, 1976, Real Parties in Interest (defendants) Buena Vista Cinema and Stephen E. Tillander served and filed "Memorandum of Points and Authorities in Opposition to Motion for Preliminary Injunction."

On July 23, 1976, Petitioner (plaintiff) lodged with the Clerk of Department 85 of Respondent Court three boxes of proposed exhibits containing the time-motion studies described in Enclosures A-4 through A-6 to Duarte City Council Resolution No. 76-28, being programs 54 through 88 exhibited at the Buena Vista Cinema.

On July 27, 1976, Petitioner (plaintiff) lodged with the Clerk of Department 85 of Respondent Court two boxes of proposed exhibits containing the time-motion studies described in Petitioner's (Third) Petition for Writ of Mandate in People ex rel. Camil v. Superior Court, 2d Civ 46869. A copy (4-1 printed reduction) of one of such time-motion studies, appearing as Appendix A-2 in 2d Civ 46869 is attached as Exhibit "12" to the "Petition for

Writ of Certiorari And/Or In The Alternative, Mandate" on file in this Court as a part of the record.

On July 28, 1976, Petitioner (plaintiff) filed and served the declarations of Robert McGuire, dated July 23, 1976, and Robert Plassmeyer, dated July 23, 1976 attesting to surveillance work done by said declarants of programs 54 through 88, exhibited at the Buena Vista Cinema.

On July 29, 1976, Petitioner (plaintiff) lodged with the Clerk of the Court the Declaration of James J. Clancy with an attached exhibit, being a copy of the Petition for Writ of Mandate with Memorandum of Points and Authorities in People ex rel. Camil v. Superior Court, 2d Civ 46869.

On July 29, 1976, Petitioner (plaintiff) served and filed "Supplemental Points and Authorities in Support of Motion for Preliminary Injunction and In Reply To Defendant's Points and Authorities dated July 21, 1976."

Petitioner's (plaintiff's) motion for a preliminary injunction came on for a hearing on August 2, 1976, at 9:15 A.M. in Department 85 of the Respondent Court, with Judge Norman R. Dowds presiding. A copy of the Reporter's Transcript of such proceedings on August 2, 1976,

(hereafter referred to as "R.T.") is attached as Exhibit "10" to the "Petition for Writ of Certiorari And/Or Mandate" on file in this Court as a part of the record. The Clerk informed the Court that he had heard from Mr. Lappen, the attorney for the defendants, who had filed a memorandum of points and authorities in opposition on July 23, 1976, and that Mr. Lappen had indicated that he would not appear for the hearing and would submit the matter on the points and authorities in opposition (R.T. p.2, lines 18-28).<sup>4/</sup>

The respondent court thereafter received in evidence on Petitioner's (Plaintiff's) (third) motion for a preliminary injunction the following trial court exhibits which were a part of the Court's file, having previously been received in evidence on petitioner's (plaintiff's) (first) motion for a preliminary

<sup>4/</sup> Defense Counsel Lappen called Petitioner's counsel (the undersigned) on Friday, July 23, 1976 and informed him that he had read the recent decisions and that although the plaintiff might be able to get an injunction against what had already been shown, the decision was meaningless "since they never show the same film twice." Plaintiff's counsel stated that he would like to have Mr. Lappen come into court and say that, to which Mr. Lappen replied that he was not even going to come to Court but was going to submit it.

injunction which was denied by Superior Court Judge Deutz on March 3, 1976 (R.T. at p.3, line 3, through p.4, line 20.):

Exh. "A" to "V"	Time-motion Studies of 11 programs (Programs 1 through 11)
Exh. "W"	Lot Split Map
Exh. "X"	Certified Copy of Duarte Ordinance #369, passed and adopted Nov. 12, 1974
Exh. "Y"	Certified Copy of Duarte Resolution 74-32, passed and adopted Nov. 26, 1974
Exh. "AA" to "DD"	Time-motion Studies of 2 programs (Programs 12 and 13)
Exh. "EE"	Affidavit of Robert Perry, dated Nov. 25, 1974
Exh. "FF"	Affidavit of Robert McGuire, dated Nov. 23, 1974
Exh. "GG"	Affidavit of James J. Clancy, dated Nov. 23, 1974
Exh. "HH"	Affidavit of City Manager, Robert Mitchell, dated Nov. 26, 1974

Exh. "II" Affidavit of Robert McGuire, dated Dec. 17, 1975

Exh. "JJ" Articles of Incorporation for Dunn Properties and United Professional Planning, general partner for Diversified Realty Fund "A", Owner of the realty

Exh. "KK" Grant deed of Mar. 31, 1972, showing Dunn transferring realty to Diversified Realty Fund "A"

Exh. "LL" Trust deed executed by Diversified Realty Fund "A" with Dunn Properties as beneficiary

Exh. "MM" Certified copies of City of Duarte records

Exh. "NN" Certified copies of City of Duarte records

Exh. "OO" Photograph of Shopping Center containing Buena Vista Cinema

Exh. "PP" Photograph of Buena Vista Cinema taken Dec. 4, 1974

Exh. "QQ" Affidavit of City Manager, Robert Mitchell, concerning the City Council's consideration of a guilty plea on a criminal charge against the Buena Vista Cinema

Exh. "SS" to "ZZ" Time-motion Studies of and "AAA" to "DDDD" Programs 14 through 19 exhibited at the Buena Vista Cinema

Exh. "EEE" Affidavit of Robert Perry, dated Feb. 28, 1975

Exh. "FFF" Affidavit of Robert McGuire, dated Feb. 27, 1975

The Court also received in evidence the following exhibits which had theretofore been lodged with the Clerk of the Court, as set forth above. (R.T. p.4, line 21 through p.7, line 28):

"GGG" thru "PPP" (Box 4) Time-motion Studies of 10 Programs (Programs 20 through 29)

"QQQ" thru "ZZZ" and "AAAA" (Box 5) Time-motion Studies of 11 Programs 30 through 40)

"BBBB" thru "MMMM" (Box 1) Time-motion Studies of 12 Programs (Programs 54 through 65)

"NNNN" thru "YYYY"	(Box 2) Time-motion Studies of 12 Programs (Programs 66 through 77)
"ZZZZ" and "AAAAA" thru "JJJJJ"	Box 3) Time-motion Studies of 11 Programs (Programs 78 through 88)
"KKKKK"	Declaration of James J. Clancy, dated July 29, 1976
"LLLLL"	Declaration of Robert McGuire, dated July 23, 1976 re Programs 54 through 88
"MMMM"	Declaration of Robert Plassmeyer, dated July 23, 1976 re 3 programs
"NNNNN"	Certified copy of Duarte Ordinance 398, passed and adopted July 13, 1976
"OOOOO"	Certified copy of Duarte Resolution 76-26, passed and adopted July 13, 1976

Robert S. Perry was called as a witness and stated that he was the office manager for petitioner's (plaintiff's) counsel and also the project manager for the Buena Vista Cinema Project and had been since July of 1974. He stated that he was the person who had executed Exhibit "EE", dated Nov. 25, 1974, which set

forth the manner in which the time-motion studies of the films were prepared. (R.T., p.9). He identified Exhibit "PPPPP" as a time-motion study of the program which had been exhibited at the Buena Vista Cinema on July 12, 1976 (Program No. 89), and Exhibit "QQQQQ" as a time-motion study of the program which had been exhibited at the Buena Vista Cinema on July 18, 1976 (Program 90), and described the manner in which those exhibits had been prepared. He also stated that the time-motion studies in boxes 1 through 5 had been prepared under his direction and in the same manner (R.T. pp.9-15). Exhibits "PPPPP" and "QQQQQ" were thereafter received in evidence (R.T. p.15, line 23).

Robert S. Perry testified that, as the finance officer, he also paid the bills for the surveillance program and that the approximate cost of each program surveilled was \$350.00, and that the total cost of the photographic work alone (77 programs which had been placed in evidence) was about \$27,000.00.<sup>5/</sup>

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<sup>5/</sup> An obvious fact which this Court has not stopped to consider is that government has no way of marshalling the evidence against the porno theater except through this time-motion study or other surveillance process. A subpoena duces tecum cannot be employed unless there is a "date" (This footnote is continued on the next page.)

Upon the conclusion of the presentation of Petitioner's (Plaintiff's) evidence, argument was heard as to (1) whether, under the decision of the California Supreme Court in People ex rel. Busch, et al. v. Projection Room Theater, et al., 17 Cal.3d 42, 550 P.2d 600, 130 Cal.Rptr. 328 (June 1, 1976), plaintiff was entitled to the extraordinary provisional remedy (preliminary injunction) (R.T. p.18, line 27, et seq.), and (2) assuming the extraordinary provisional remedy were available, and the Court were to find the 77 programs shown in the two-year period to be obscene, whether the Court could close down the theater, or was limited in the relief it might grant to that of enjoining the exhibition of the films which were before the Court. (R.T. p.23, lines 4, et seq.) At the close of argument, the respondent court denied petitioner's (plaintiffs') motion for a preliminary injunction with the following ruling:

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certain" for the production of the motion picture film, which can only be achieved by setting a trial date for a motion for a preliminary injunction. By inferring that such injunctive relief may not be obtained, the Court is making it procedurally impossible to bring the courtroom weapons to bear on the moving target which a weekly change of program presents!

(R.T. p.24, line 26, through p.25, line 11):

"THE COURT: Well, as to fashioning a remedy, I think you do have a remedy, and that is going down to Department 1 and seeking an early trial.

However, in this particular case, I hope you don't pursue that right away, because I am going to deny the motion for preliminary injunction and I hope that you will seek a writ from the Court of Appeal, so that the matter will go back to the -- at least to the Court of Appeal and possibly to the Supreme Court as soon as possible in order to obtain a clear ruling on this matter.

It does seem to me that the Supreme Court could have clearly stated whether or not a preliminary injunction is available in this kind of a case, since they knew that a preliminary injunction motion was pending in the Busch case."

And at page 26, lines 1 through page 27, line 7:

"THE COURT: Well, in fairness to your position, there is some other language in the Busch case that throws the question in doubt, but it seems to me that the language that I have quoted that says that you must have a final adjudication of the specific film to be obscene precludes a determination on a preliminary injunction, since that is a provisional remedy and all that I do on an application for a preliminary injunction is to determine, among other things, whether you have established a reasonable probability of succeeding at the trial.

"The other language that I referred to is on page 59 of the official decision where the Court says:

'We emphasize that the closing of such bookstores or theaters, either temporarily or permanently, or the enjoining of the exhibition or sale . . . , and so forth, ' . . . constitutes an impermissible prior restraint in violation of the First and Fourteenth Amendments to the United States Constitution.' (6/)

"Well, if a temporary injunction couldn't be given in any event, why did they say 'either temporarily or permanently'?"

"But, taken as a whole, I take it that the California Supreme Court has told me, and I am of course bound by their determination, that a preliminary injunction cannot be granted even though I may be of the opinion that the films are obscene. (6)

And furthermore, if you are going to seek a writ, 'which I hope you will, I might also state that I view the Busch case as precluding any kind of an injunction closing down the theater. It seems to me that they are telling us that the showing of particular films that have been finally adjudged to be obscene can be enjoined, but not the operation of the theater."

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6/ The basis for Judge Dowd's ruling clearly presents a federal question. See Rule 19(1)(a) of the Rules of the Supreme Court of the United States.

Thank you, counsel.

MR. CLANCY: Thank you, Your Honor."  
(The proceedings were concluded.) (Our emphasis).

A copy of the Minute Order of Judge Dowds, filed on August 2, 1976, denying petitioner's motion for a preliminary injunction is attached to the Petition herein at "Appendix B".

A petition for Writ of Certiorari And/Or, Mandate" was filed in the Court of Appeal on August 24, 1976, requesting that trial judge Norman Dowds be required to vacate his minute order of August 2, 1976 determining that he had no jurisdiction to grant relief, and show cause why the August 2, 1976 Minute Order should not be vacated and the conduct complained against be enjoined and summary interlocutory abatement effectuated.

On September 1, 1976, the "Petition for Writ of Certiorari And/Or Mandate" was denied by a 2-1 vote. Associate Justice Lynn Compton was of the opinion that the Petition for an Alternative Writ should have been granted.

On September 10, 1976, a Petition for Hearing on the denial of the petition for an extraordinary writ was filed in the California Supreme Court, and on September 29, 1976 that Court entered its order denying the hearing.

REASONS FOR GRANTING THE WRIT

A. Neither The Majority Nor The Minority  
Opinions In Near v. Minnesota Ever  
Intended The Result Reached Herein.

Petitioner contends that the respondent court has misconstrued the real import of Near v. Minnesota, supra. The majority of the Court in Near did not say that a trial court is automatically ousted of its equity jurisdiction every time a pornographer voices a "free speech" claim. More succinctly, a first amendment issue is not raised every time a piece of soiled toilet paper is exposed to view in the Courtroom.

The constitutional fears expressed regarding the application of the "padlock" laws to theaters such as the real party in interest, Buena Vista Cinema, which regularly show nothing but hard-core pornographic films (200 films in a 2-year period) are groundless. Petitioner submits that a close reading of the majority and dissenting opinions in Near v. Minnesota, 283 U.S. 697, 51 S.Ct. 525, 75 L.Ed. 1357 will demonstrate that the fact situation presented to Judge Dowds was specifically excepted from the confines of that "prior restraint" construc-

tion. The dissenting opinion in Near (Butler, Van De Vanter, McReynolds and Sutherland) establishes the fact that all nine justices on the Near Court would disagree with the myth which the Near citation is perpetuating.<sup>7/</sup> The Near dissent said:

"The opinion seems to concede that under clause (a) of the Minnesota law the business of regularly publishing and circulating an obscene periodical may be enjoined as a nuisance . . . ."

Not only did the Near majority of five justices (Hughes, Holmes, Brandeis, Roberts, Stone) concede, by their silence the above interpretation placed on that decision by the four dissenters,

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<sup>7/</sup> In the Weekly Law Digest of January 31, 1975, there is a quotation that would appear to be particularly appropriate when one considers the relationship between the trial court's ruling herein and the Near precedent:

"Myths die hard. Constitutional myths are no exception. Many a doctrine exists today that can barely be traced to the conscious intent of the Founding Fathers or the framers of the Fourteenth Amendment. The pattern is familiar; a point is argued by imaginative counsel, adopted in decision by a court, and ultimately, through the classic process of reiteration and enlargement by advocates and jurists, the doctrine is established as an integral part of our constitutional fabric . . . ."

but it was stated, positively, in the majority opinion (re prior restraint):

"On similar grounds, the primary requirements of decency may be enforced against obscene publications . . . ."

Petitioner submits that the correct rule of law to be applied to these facts is that expressed in U.S. v. Raines, 362 U.S. 17, 80 S.Ct. 519, 4 L.Ed.2d 524 and by the dissent in Near v. Minnesota, supra:

"The defendant here has no standing to assert that the statute is invalid because it might be construed so as to violate the Constitution. His right is limited solely to the inquiry whether, having regard to the points properly raised in his case, the effect of applying the statute is to deprive him of his liberty without due process of law. This Court should not reverse the judgment below upon the ground that in some other case the statute may be applied in a way that is repugnant to the freedom of the press protected by the Fourteenth Amendment . . . ."

B. The City Of Duarte's Porno Theater Problem Raises A Substantial Federal Question.

In the 18 terms of Court since Roth-Alberts, 354 U.S. 476, 1 L.Ed. 2d 1498, 77 S.Ct. 1304 (1957), was decided in June of 1957, the dockets and decisions of this Court have chronicled a major governmental struggle over the public morals of this nation (as they relate to human sexuality), between the constitutional powers of the government as a whole embodied in the Tenth Amendment (Police Power), and the countervailing rights of the individual set forth in the First Amendment. In the pattern which has evolved from those decisions, this Court has fashioned a procedural requirement to maintain the balance. As recently as the 1974 October Term, Justice Blackmun, writing the majority opinion for five justices, in Southeastern Productions Ltd. v. Conrad, 420 U.S. 546, 43 L.Ed. 2d 448, 95 S.Ct. 1239 (March 18, 1975) ruled that minimal procedural safeguards had not been provided to the individual, in a case where government (the City of Chattanooga) sought to deny the use of a municipal auditorium for presentation of the theatrical production "Hair".

See also: Freedman v. Maryland, 380 U.S. 51, 13 L.Ed.2d 649, 85 S.Ct. 734 (1965); United States v. Thirty-seven Photographs, 402 U.S. 363, 28 L.Ed.2d 822, 91 S.Ct. 1400 (1971); Blount v. Rizzi, 400 U.S. 410, 27 L.Ed.2d 498, 91 S.Ct. 423 (1971); Teitel Film Corp. v. Cusack, 390 U.S. 139, 19 L.Ed.2d 966, 88 S.Ct. 754 (1968). The central theme in all of these decisions has been, as stated by Justice Blackmun in Southeastern Productions Ltd., supra, at page 460, that:

"a prompt final judicial determination must be assured".

It would seem self-evident that "prior restraint" and "free speech" are not the exclusive province of the individual, but are shared equally with the community as a whole, for it is only through the judicial system that the community itself can "speak" collectively, so as to reject that which is offensive to "public morality".<sup>8/</sup> While the procedural requirement

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<sup>8/</sup> The fact that the Buena Vista Cinema has been permitted to exhibit, since June 28, 1974, daily and uninterruptedly, over 90 programs, containing 200 hard-core pornographic films, creates, for the young and old alike, an autoptical illusion that such conduct is acceptable to the California community. This is so because the existence of such an operation is a matter

of a "prompt judicial determination," referred to above, has always been discussed in the framework of "prior restraint" and the "First Amendment" rights of the individual to free speech in the marketplace of ideas, there is no reason to believe such procedural requirement does not, for the very same reason, also bind the state system where, as here, the same claim is being presented by the community itself, under the name of representative government.

The petition herein asserts that procedural requirement as a federal right - the right to an immediate hearing and determination.<sup>9/</sup>

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which (1) is readily perceived by the senses and (2) as such, assumes the form of "verbal conduct". See Program 40 at Exh. "12" to the "Petition for Writ of Certiorari And/Or In The Alternative Mandate" and 4 Wigmore §1150 discussing "autoptic proference", and Justice Brennan, speaking for the U.S. Supreme Court in Sam Ginsberg v. N.Y., 390 U.S. 629 at 642 fn. 10 (1968).

<sup>9/</sup> The judicial system in California, by its refusal to provide a prompt forum for the issues herein presented, has effectively imposed a "prior restraint" on the Community's right to "speak out". See the opinion of the Montana Supreme Court in U.S. Manufacturing and Distributing Corp. v. City of Great Falls, 546 P.2d 522 at p. 526 (Feb. 25, 1976), which suggests that a local community has an inherent right to halt the type of conduct specifically pleaded in the Complaint below. Is the right to an immediate hearing a one-way street?

Where such federal procedural safeguards do not exist by statute, the State Court is required to fashion the same through judicial construction and interpretation. See People ex rel. Busch, etc., et al. v. Projection Room Theater, et al., 17 Cal. 3d 42, 130 Cal. Rptr. 328 at 338.

Petitioner contends that the action of the respondent court denying petitioner's application for extraordinary relief was a judicial act which is in excess of jurisdiction in that:

(a) by failing and refusing to consider plaintiff's request for extraordinary provisional relief, respondent court divested itself of the Equity jurisdiction which is inherent in the decision of the California Supreme Court in People ex rel. Busch, et al. v. Projection Room Theater, et al., supra, and

(b) the evidence which the petitioner offered in support of its motion, and which was uncontroverted, showed: (1) that under Near, supra, properly interpreted, "free speech" was not a relevant issue, and (2) the existence of a nuisance per se. Reasonable minds would not differ

and all would hold that such evidence showed the Buena Vista Cinema to be a public nuisance as a matter of law. By failing and refusing to take judicial action on Petitioner's motion for extraordinary provisional relief from such moral nuisance per se, the respondent court divested itself of the fundamental jurisdiction which is inherent in its judicial power, the exercise of which, under the instant facts, is made mandatory by the federal constitution and the respondent court's responsibility as the ultimate arbiter and guardian of public morals.

Petitioner contends that it has no appeal, not any plain, speedy and adequate remedy from the jurisdictional error of the respondent state which is predicated upon this federal question. See Rule 19(1) (a) of the Rules of the Supreme Court of the United States. While an appeal would ordinarily lie under Civil Procedure Code Section 904.1(f) "from an order . . . refusing to grant . . . an injunction", the respondent court's action was not an order which refused to grant an injunction, but rather a refusal to entertain jurisdiction for the purpose of determining whether an injunction should issue.

Further, an appeal would be inadequate, in that any relief which might be obtainable in the future in such appellate process would not provide the City of Duarte with the summary interlocutory abatement to which it is entitled, under federal law and the exhibits which were received in evidence by the respondent court. Such a delay, in abating a moral nuisance per se, does irreparable harm to the local community in Duarte, California, and unreasonably deprives its residents of the comfortable enjoyment of life and property guaranteed them by the federal constitution. Further, if such matter is not litigated immediately, the Real Parties in Interest will continue their illegal actions up to and until the time in the distant future the matter is called for trial, and then will disappear. See footnotes 2 and 4 at pp. 12 and 28.

C. The Federal Question Has An Easy Solution.

The solution is simple. If the real parties in interest object to the granting of temporary relief after a hearing on a preliminary injunction, they cannot, at the same time, object

to the mandatory consolidation of that hearing with the hearing on the final injunction, with the intention of granting full relief, if such is warranted, at the consolidated hearing. The California Courts are obliged to adapt their procedures so as to arrive at a Constitutional result. In Busch the California Supreme Court noted, in this context, at p. 336:

"Furthermore, the United States Supreme Court recently emphasized within the foregoing context that courts have an obligation to construe statutes in such a way as to avoid serious constitutional doubts. . . ." (Our emphasis).

and, at p. 338:

"We are obliged to construe and interpret legislation in a manner which will uphold its validity. (Citations). Thus, the courts have held that provision for a prior adversary hearing may be implied by law in otherwise silent statutory provisions."

This Court need only inform the states that it is entirely acceptable to grant full relief against porno theaters at the preliminary injunction stage, so long as the State procedures allow the motion for a preliminary injunction

to be given an immediate "full blown" hearing, if such appears to be necessary. The trial courts in Equity, in accomplishing full and fair justice, customarily have a wide discretion to order a consolidation of the hearing on the preliminary injunction with the hearing on the final injunction. On this point, compare Rule 65(a)(2) of the Federal Rules of Civil Procedure, which provides for consolidating the hearing of an application for a preliminary injunction with the trial on the merits:

"CONSOLIDATION OF HEARING WITH TRIAL ON MERITS. Before or after the commencement of the hearing of an application for a preliminary injunction, the court may order the trial of the action on the merits to be advanced and consolidated with the hearing of the application. . . ."

The Advisory Committee's Notes make this observation:

"SUBDIVISION (a)(2). This subdivision provides express authority for consolidating the trial on the merits. The authority can be exercised with particular profit when it appears that a substantial part of the evidence offered on the application

will be relevant to the trial proper. Repetition of evidence is thereby avoided. The fact that the proceedings have been consolidated should cause no delay in the disposition of the application for the preliminary injunction, for the evidence will be directed in the first instance to that relief, and the preliminary injunction, if justified by the proof, may be issued in the course of the consolidated proceedings. Furthermore, to consolidate the proceedings will tend to expedite the final disposition of the action. It is believed that consolidation can be usefully availed of in many cases. . . . The subdivision is believed to reflect the substance of the best current practice and introduces no novel conception."

Also compare Rule 65(B)(2) of the Ohio Rules of Civil Procedure, modeled after the Federal Rules, wherein the Ohio Trial Court may order the trial of the action on the merits to be advanced and consolidated with the hearing of the application for the preliminary injunction, or alternatively, that the evidence received at the preliminary injunction hearing should be made a part of the record of the hearing on the final injunction.

Note, also, the result reached by this Court in State of Ohio ex rel. Ewing v. "Without A Stitch", 37 Ohio St. 2d 95, 307 N.E.2d 911, 914, appeal dismissed for want of a substantial federal question in 421 U.S. 923, 95 S.Ct. 1649, 44 L.Ed.2d 82, cited with approval in Busch, supra, at p. 914.<sup>10/</sup>

<sup>10/</sup> As noted in the Petition for a Writ of Certiorari filed in this Court in the Busch case, the analysis of the California Supreme Court's majority opinion is clearly in error. See Petition for Writ of Certiorari in People ex rel. John K. Van de Kamp v. Projection Room Theater, No. 76-340 at pp. 17-20 and 23-24:

"The above holding of the California Supreme Court appears to be in direct conflict with this Court's decision in Art Theater Guild, Inc., et al. v. Ewing, 421 U.S. 923, 44 L.Ed.2d 82, 95 S.Ct. 1649 (1975) wherein this Honorable Court "dismissed for want of a substantial federal question" an appeal from the Ohio Supreme Court's decision in State ex rel. Ewing v. "Without A Stitch", (Ohio, 1974) 307 N.E. 2d 911, thereby ruling on the merits (see Hicks v. Miranda, U.S., 45 L.Ed.2d 223, 95 S.Ct. 2281, 2289 (1975)) that an order closing a theater which exhibited a single obscene motion picture film for a period of one year was constitutionally valid, at least where the owner could obtain a release by (a) appearing in court, (b) filing a bond in the full value of the property, and (c) demonstrating to the court that he will prevent the nuisance from being reestablished (i.e., the

The Respondent Court herein had a duty, incident to its Equity Jurisdiction, to hear and determine on the merits whether the exhibits and testimony, which were received in evidence, entitled Petitioners to a preliminary injunction, which would include both injunctive relief as to obscene films which have been shown in the past two year, and summary interlocutory abatement by closure. Alternately, it had the duty

exhibition of the particular film declared obscene). (See, "Without A Stitch", supra, 307 N.E. at 917-918 and U.S. Supreme Court's comment on that case in Huffman v. Pursue, Ltd., 420 U.S. 592, 43 L.Ed.2d 482, 95 S.Ct. 1200 (1975), at 43 L.Ed.2d 496-497, n. 23 adn the last two sentences of text preceding that footnote). Therefore, there is nothing that would constitutionally prevent at least this much abatement relief in the instant case.

"However, we are not dealing here with the exhibition of a single obscene motion picture film (as in "Without A Stitch") but with the continual exhibition of obscene films (R.T. in Projection Room Theater case, p. 2, lines 30-32) on premises which hold themselves out to the public as specializing in "Adult Films" (R.T. in Projection Room Theater case, pp. 188:5, 200 (incorporated into complaint at id. 4:18-26)). (f "'(a) quotation from Voltaire in the flyleaf of a book will not constitutionally redeem an otherwise obscene publication'" (Miller v. California, 413 U.S. 15, 25, 37 L.Ed.2d 419, 431, 93

(This footnote is continued on the next page.)

to consolidate the final hearing with the preliminary hearing, if required, and/or send it out to another Court for an immediate trial on the merits. In its minute order entered on August 2, 1976 (Appendix "B") the respondent court failed to perform its duty.

The above-described action of respondent court, in refusing to entertain jurisdiction and grant the preliminary injunction requested by Petitioner (Plaintiff), after receiving in evidence the above-described exhibits and testimony, was an erroneous, arbitrary and prejudicial abuse of its discretion and deprived petitioners of due process of law under the federal constitution.

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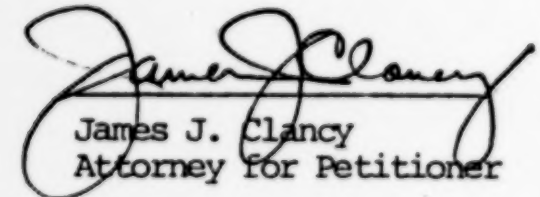
S.Ct. 2607, n. 7 (1973)), it would seem that premises which specialize in obscene films would similarly not be redeemed by an occasional non-obscene films. "Where (as here) the purveyor's sole emphasis is on the sexually provocative aspects of his publication(s) that fact may be decisive in the determination of obscenity" (Ginzburg v. United States, 383 U.S. 463, 470, 16 L.Ed.2d 31, 37-38, 86 S.Ct. 942, 947 (1966); see also Memoirs v. Massachusetts, 383 U.S. 413, 420, 86 S.Ct. 975, 978 (1966), United States v. Rebhuhn, 109 F.2d 512 (cert.den. 60 S.Ct. 974; discussed in Ginzburg, 383 U.S. at 472-473) and other cases cited in Ginzburg at n. 14 (383 U.S. at 472)."

CONCLUSION

For the reasons noted above and those stated in the "Petition for a Writ of Certiorari And/Or In The Alternative, Mandate" on file as a part of the record herein, a hearing in the above-entitled cause should be granted and a writ should issue as prayed for in said "Petition for Writ of Certiorari And/Or, Mandate"

DATED: December 24, 1976

Respectfully submitted,

  
James J. Clancy  
Attorney for Petitioner

CERTIFICATE OF SERVICE

I hereby certify that on this 24th day of December 1976, copies of the within Petition for Writ of Certiorari were mailed, postage prepaid, to the below listed parties to the proceedings. I further certify that all parties required to be served have been served.

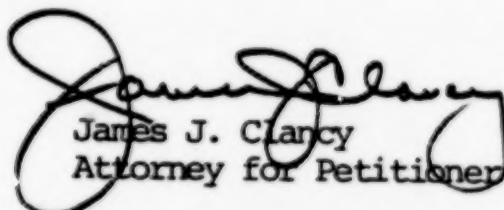
Honorable Judge Norman Dowds  
L.A. Superior Court, Dept. 85  
111 North Hill Street  
Los Angeles, CA

Sharon Giannetta  
720 West 86th Street  
Los Angeles, CA

Lappen, Abelson & Harris  
361 North Canon Drive  
Beverly Hills, CA

Robert McMahon  
1151 Dove Street, Ste. 290  
Newport Beach, CA

Court of Appeal  
3580 Wilshire Blvd.  
Room 301  
Los Angeles, CA 90010

  
James J. Clancy  
Attorney for Petitioner

APPENDIX A

Statement of Facts (pp. 5-34) of  
Petitioner's first petition  
for writ of certiorari to the  
U. S. Supreme Court filed in  
this cause . . . . . A-5 - A-34

## STATEMENT OF FACTS

### A. Introduction

In the 18 terms of Court since Roth-Alberts<sup>1/</sup> was decided in June of 1957, the dockets and decisions of this Court have chronicled a major governmental struggle involving the public morals of this nation relating to human sexuality. In simple terms, that struggle can best be characterized as a confrontation between the constitutional powers of the government as a whole, embodied in the Tenth Amendment and commonly referred to as the police power, and the counter-

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<sup>1/</sup> Roth v. United States, 354 U.S. 476, 1 L.Ed.2d 1498, 77 S.Ct. 1304 (1957).

vailing rights of the individual, set forth in the First Amendment. In the pattern which has evolved from those decisions, this Court, as the final arbiter in that struggle, has fashioned a procedural requirement to maintain the balance in that contest. As recently as this past 1974 October Term, Justice Blackmun, writing the majority opinion for five justices, in Southeastern Productions Ltd. v. Conrad, \_\_\_ U.S. \_\_\_, 43 L.Ed.2d 448, 95 S.Ct. \_\_\_ (March 18, 1975) ruled that minimal procedural safeguards had not been provided where the City of Chattanooga sought to deny the use of a municipal auditorium for presentation of the theatrical production "Hair". The central theme in all of these decisions<sup>2/</sup> has been, as stated by Justice Blackmun in Southeastern Productions, Ltd., supra, at page 460, that:

"a prompt final judicial determination must be assured".

While this procedural requirement of a "prompt judicial determination" has always been discussed

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<sup>2/</sup> Southeastern Promotions, Ltd. v. Conrad, \_\_\_ U.S. \_\_\_, 43 L.Ed.2d 448, 95 S.Ct. \_\_\_ (1975); Freedman v. Maryland, 380 U.S. 51, 13 L.Ed.2d 649, 85 S.Ct. 734 (1965); United States v. Thirty seven Photographs, 402 U.S. 363, 28 L.Ed.2d 822, 91 S.Ct. 1400 (1971); Blount v. Rizzi, 400 U.S. 410, 27 L.Ed.2d 498, 91 S.Ct. 423 (1971); Teitel Film Corp. v. Cusack, 390 U.S. 139, 19 L.Ed.2d 966, 88 S.Ct. 754 (1968).

in the framework of "prior restraint" and the "First Amendment" rights of the individual to free speech in the marketplace of ideas, there is no reason to believe such procedural requirement does not, for the same reason, also bind the state system where the same claim is presented by the community itself, at the instance of representative government. It would seem self-evident that "prior restraint" and "free speech" are not the exclusive province of the individual, but apply equally as well in the latter case of representative government, for it is only through the judicial system that the community itself can "speak" collectively, so as to reject that which is offensive to "public morality". <sup>3/</sup> This petition asserts such a right and raises a question as to whether or not we have been traveling upon a one-way street.

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<sup>3/</sup> The fact that the Buena Vista Cinema, has been permitted to exhibit since June 28, 1974, daily and uninterruptedly, over 58 programs, containing 116 hard core pornographic films, becomes autoptical proof that such conduct is acceptable to the community, since the existence of such an operation is a matter which (1) is readily perceived by the senses and (2) as such, assumes the form of "verbal conduct". See 4 Wigmore § 1150 discussing "autoptic proference", and Justice Brennan, speaking for this Court in Sam Ginsberg v. N.Y., 390 U.S. 629 at 642 fn. 10 (1968). The judicial system in California, by its refusal to provide a prompt forum for the issues herein presented, has effectively imposed a "prior restraint" on the Community's right to "speak out".

B. The Legislative Inquiry and Its  
Determination.

On June 12, 1974, the Real Party in Interest, Stephen E. Tillander of 8016 Radford Avenue, North Hollywood, California, 91605, filed an application for a business license for the "Buena Vista Cinema" at 1345 East Huntington Drive, Duarte, California, and on June 28, 1974, business license No. 477 was issued by the City of Duarte to Stephen E. Tillander, d.b.a. Buena Vista Cinema, 1345 East Huntington Drive, Duarte, California. On July 3, 1974, business license No. 728 was reissued to the same person.

The "Buena Vista Cinema" is a small 80' x 43' theater (capacity of 130 seats) constructed in March of 1972, as a part of a small shopping center complex, located at the corner of Buena Vista and Huntington Drive in Duarte, California. The shopping center contains such family-centered stores as "Von's", "Thrifty Drug Store", and "Sprouse-Ritz". The theater itself adjoins the Thrifty Drug Store.

Beginning on or about June 28, 1974, and repeatedly and continuously thereafter, up to and including November 27, 1974, the date of the filing of the Complaint below, Stephen E. Tillander, doing business as "Buena Vista

Cinema", hereinafter referred to as "Buena Vista Cinema", publicly exhibited, or caused to be exhibited as a regular course of business, and possessed for the purpose of such exhibition, a group of 22 motion picture films, which were exhibited continuously in eleven separate programs of two films each. (A list of these films together with the dates on which they were exhibited is attached hereto as Appendix B.)

Pursuant to its lawful powers under Article 11, Section 7 of the California Constitution, Government Code Sections 38771, 38773, 38773.5, Civil Code Sections 3479, 3480, 3491, and 3494, and Code of Civil Procedure Section 731, the City Council of the City of Duarte did, on September 10, 1974, pass and adopt Ordinance No. 367 which became effective on the 12th day of October, 1974, and did supersede the same with Ordinance No. 369, adopted as an emergency ordinance on the 12th day of November, 1974, which became effective immediately on its adoption. Duarte Ordinance No. 369 <sup>4/</sup> defines the term "lewd" film

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<sup>4/</sup> A copy of Duarte City Ordinance 369 appears at Exhibit A-1 to the First Petition for Writ of Mandate in L.A. 30396, 2d Civ. 45526. Said Exhibit A-1 also appears in this record as a part of Exhibit 1 to the Petition (Third) for Writ of Mandate on file herein. See Statement of Facts herein at page 19 infra.

in terms of the Miller v. California requirements and declares that any and every place in the City of Duarte where "lewd" films are publicly exhibited as a regular course of business, or possessed for the purpose of such exhibition is a public nuisance, and that any and every "lewd" film which is publicly exhibited or possessed for such purpose in the City of Duarte is a public nuisance per se; and establishes procedures for the abatement of such public nuisances in the City of Duarte.

At its regular meeting on November 26, 1974, the City Council of the City of Duarte did meet and, pursuant to Ordinance No. 369, did consider evidence in the form of six volumes of time-motion studies of 22 of the above described films.

By affidavit, the City Council was informed that said time-motion studies had been prepared from films exhibited at the Buena Vista Cinema and contained a chronological series of photographs, timed in their relative order of appearance, which photographs fairly and accurately depict the sexual conduct visually portrayed on the motion picture screen of the "Buena Vista Cinema" during the above mentioned dates.

Pursuant to Ordinance No. 369, the City Council of the City of Duarte did, on November

26, 1974, act by Resolution No. 74-32,<sup>5/</sup> and did in Sections 3 and 4 thereof, find and declare the "Buena Vista Cinema" to be a public nuisance and each of the films listed in Appendix "A" to be a "lewd" film and a public nuisance per se under such ordinance.

Pursuant to said Resolution No. 74-32, the City Council of the City of Duarte did, in Section 5 thereof, inform and give notice to all persons having a legal or equitable interest in the "Buena Vista Cinema" of the Council's findings of fact as to the public nuisances involved, and did order such persons to summarily abate the same upon receiving notice, and in Section 7 of said Resolution, did provide for service of notice on such persons.

Pursuant to Sections 6 and 7 of said Resolution No. 74-32, the City Council of the City of Duarte did order Petitioner William Camil as the City Attorney of Duarte to file a civil action, pursuant to Code of Civil Procedure, Section 731, seeking (A) abatement of such public nuisances in judicial proceedings, as required

<sup>5/</sup> A copy of Resolution No. 74-32 appears at Exhibit A-2 to the First Petition for Writ of Mandate in L.A. 30369, 2d Civ. 45526. Said Exhibit A-2 also appears in this record as a part of Exhibit 1 to the Petition (Third) for Writ of Mandate on File herein. See Statement of Facts herein at page 19 infra.

by Section 6 of Duarte Ordinance No. 369; (B) a declaratory judgment (1) that the above described films were "lewd" films under Ordinance No. 369, and Resolution No. 74-32, and as such, public nuisances per se, and (2) that the "Buena Vista Cinema" was a public nuisance under Duarte Ordinance No. 369 and Resolution No. 74-32; and (C) an accounting, forfeitures and award of costs as are authorized by Duarte Ordinance No. 369.

C. The Judicial Relief Sought

On November 27, 1974, Petitioner William Camil, as City Attorney of the City of Duarte, alleging the above facts, commenced a civil action in the Superior Court of Los Angeles County <sup>6/</sup> pursuant to the authority of Code of Civil Procedure Section 731, with the filing of the following:

1. A Complaint in Equity to Abate a Public Nuisance under Duarte City Ordinance No. 369, and for a Declaratory Judgment and Forfeitures, being People of the State of California ex rel William Camil, City Attorney of the City of

<sup>6/</sup> A copy of the pleadings filed in Civil Action 107347 appears in this record as a part of Exhibit 1 to the Petition (Third) for Writ of Mandate in 2d Civ. 46869 on file herein. See Statement of Facts herein at page 19 infra.

Duarte, California vs. Buena Vista Cinema, et.al.,  
No. C-107347.

2. Points and Authorities in Support of Complaint in Equity to Abate a Public Nuisance and for a Declaratory Judgment and Forfeitures.

As part of the relief in said civil action, Petitioner, as the City Attorney of the City of Duarte, sought to abate as a public nuisance (1) the Buena Vista Cinema, 1345 East Huntington Drive, Duarte, California, in Los Angeles County, wherein lewd and obscene films have been and are now being exhibited continuously since on or about June 28, 1974, and (2) the positive motion picture prints used by the operators of said theater as the means of exhibiting said motion picture films at that theater. The time-motion studies of each of the abovementioned 22 films which were considered by the City Council of Duarte, were pleaded specially as exhibits to said Complaint and incorporated therein by reference. A summons was issued and service of process was commenced as to all defendants named in said action.

The Complaint alleged that each of the said 22 films was a "lewd" film as that term is defined in Duarte Ordinance No. 369, in that each is a film which (a) the average person, applying contemporary community standards would find, when

considered as a whole, appeals to the prurient interest, and (b) depicts or describes patently offensive representations or descriptions of (1) ultimate sexual acts, normal or perverted, actual or simulated, and (2) masturbation, and lewd exhibition of the genitals and genital area, and (c) when considered as a whole, and in the context in which it is used, possesses no serious literary, artistic, political, or scientific value. It was further alleged that under Duarte Ordinance No. 369 and Resolution No. 74-32 each of such lewd films is a public nuisance per se and the building structure known as the "Buena Vista Cinema" is a public nuisance, being a place in the City of Duarte where "lewd" films are publicly exhibited and possessed for such exhibition as a regular course of conduct.

On December 2, 1974, Petitioner filed a motion for Preliminary Injunction in C.A. 107347 and noticed the same for a hearing on December 16, 1974. Petitioner also filed a notice of lis pendens in the County Records office giving notice of the pendency of C.A. 107347.

A copy of the abovementioned Summons, Complaint, Points and Authorities, Motion for Preliminary Injunction and Notice of Motion for Preliminary Injunction in People of the State of California ex rel William Camil, City Attorney of Duarte

v. Buena Vista Cinema, et.al., No. C-107347, was served on the following parties on the following dates:

Dunn Properties Corporation  
December 4, 1974;

Diversified Realty Fund "A"  
December 5, 1974;

Title Insurance and Trust Company  
December 4, 1974;

Stephen E. Tillander, dba Buena Vista Cinema  
December 6, 1974;

On November 27, 1974, a Subpoena Duces Tecum was issued and duly served on the projectionist and person in charge of the Buena Vista Cinema, requiring that the films, "After School Exams" and "Gina, the Foxy Chick" be brought to Court at the hearing set for December 16, 1974. On December 4, 1974, a Subpoena Duces Tecum was issued and duly served on John Doe 2, the person in charge of the Buena Vista Cinema, requiring that the films "The Cheaters" and "Busy Bodies" be brought to Court at the hearing set for December 16, 1974.

On December 11, 1974, Real Parties in Interest Stephen E. Tillander and Buena Vista Cinema appeared in said actions by attorney Jonathan Bailey Lappen and filed Points and Authorities in Opposition to the Motion for Preliminary Injunction in No. C-107347.

On December 17, 1974, the Petitioner as Plaintiff in Civil Action C-107347 served and filed the following papers on all parties to the actions:

1. Memorandum of Points and Authorities in reply to Real Party in Interest Tillander's Points and Authorities in Opposition to the Motion for a Preliminary Injunction in No. C-107347.

The Petitioner's Motions for a Preliminary Injunction in Civil Action 107347 came on for a hearing in Department 3 of the Los Angeles Superior Court before the Honorable Max F. Deutz on Tuesday, December 17, 1974, and Thursday, December 19, 1974, at which time Jonathan Bailey Lappen appeared as counsel for Real Parties in Interest, Stephen E. Tillander and Buena Vista Cinema. On December 19, 1974, on Petitioner's Motion, Judge Deutz entered an order consolidating both actions (Nos. C-107347 and C-107771)<sup>7/</sup> for all purposes. An oral stipulation was entered into between Petitioner and Real Parties in Interest Stephen E. Tillander and Buena Vista Cinema

7/ Civil Action 107771, entitled City of Duarte, a Municipal Corporation and James J. Coughlin v. Buena Vista Cinema et al. was based upon the California Red Light Abatement Statute. A copy of the pleadings in Civil Action 107771 appears in this records as a part of Exhibit 1 to the Petition (Third) for Writ of Mandate in 2d Civ. 46869 on file herein. See Statement of Facts herein at page 19 infra.

in said actions, wherein it was agreed that a general demurrer should be deemed to have been filed by Real Parties in Interest Stephen E. Tillander and Buena Vista Cinema on all grounds stated in the Points and Authorities previously filed by said Real Parties in Interest in opposition to the Motion for Preliminary Injunction.

At the hearing on Petitioner's Motion for Preliminary Injunction in Civil Actions 107347 and 107771 on Thursday, December 19, 1974, Petitioner filed with the Court additional affidavits and exhibits regarding the nature of the films being exhibited at the Buena Vista Theatre subsequent to the action of the City Council on November 26, 1974. (A list of these affidavits and exhibits is attached hereto as Appendix C.)

On the same date, Petitioner also filed with said Court, a certified copy of the Police Record before the City Council and considered by them prior to the adoption of Duarte City Council Resolution No. 74-32, reciting a criminal charge filed on the films "Sexual Freedom in the Ozarks" and "How to Bury a Stiff", which were exhibited at the Buena Vista Cinema on July 30, 1974, and a guilty plea entered to the charge on Oct. 29, 1974.

On Thursday, December 19, 1974, further

exhibits were received in evidence by the trial court during the presentation of the Petitioner's case in chief on the aforementioned Motion for Preliminary Injunction. (A list of these exhibits is attached hereto as Appendix D.) Real Parties in Interest offered no counter-affidavits.

At the conclusion of oral arguments on Thursday, Dec. 19, 1974, Los Angeles Superior Court Judge Max F. Deutz ruled orally from the bench. In his oral rulings, Judge Deutz denied Petitioner's Motion for a Preliminary Injunction and sustained the Defendants' demurrer to the complaints in CA 107347 and 107771 on the grounds that, under the law stated in Harmer et al. v. Tonylyn Prod. Inc. et al., 23 Cal.App.3d 941, 100 Cal. Rptr. 576 (Mar. 21, 1972), Petitioners could not state a cause of action under either the Red Light Abatement Act or Civil Code sections 3479 and 3480 (common law public nuisance). Judge Deutz also ruled that, under Lancaster v. Municipal Court, 6 Cal.3d 805, 100 Cal.Rptr. 609 and Harmer et.al. v. Tonylyn Prod., Inc., et.al., supra, Petitioner could not state a cause of action as to C.A. 107347, under Duarte City Ordinance 369, because of the combination of the law stated in the Harmer case and the doctrine of preemption.

On Dec. 27, 1974, Petitioner joined with

others to file its original Petition in the California Supreme Court, entitled People of the State of California ex rel William Camil, City Attorney of the City of Duarte, Petitioner, vs. Superior Court of the State of California for the County of Los Angeles, Respondent, and Buena Vista Cinema et al., Real Party in Interest; and City of Duarte, a Municipal Corporation, and James J. Coughlin, Petitioners, vs. Superior Court of the State of California for the County of Los Angeles, Respondent, and Buena Vista Cinema et al., Real Party in Interest, L.A. 30396 in which copies of the abovementioned pleadings and papers filed in the two consolidated cases were incorporated by reference as Exhibits A-1 through A-18 (C.A. 107347) and B-1 through B-9 (C.A. 107771) to the petition. Pursuant to an order of Superior Court Judge Max F. Deutz, dated Dec. 26, 1974, the time-motion studies of the aforementioned 26 hard-core pornographic films were also filed with the California Supreme Court. On the same date, the California Supreme Court acted on the petition and ordered the same and the time-motion studies of the 26 hard-core motion picture films transferred to the Court of Appeal, Second Appellate District, where such case was filed as 2d Civ. 45526.

On December 27, 1974, the Court of Appeal,

Second Appellate District, Third Division, filed its opinion in Busch et al. v. Projection Room Theater et al., 44 Cal.App.3d 111, 118 Cal.Rptr. 428, which held, contrary to Harmer v. Tonylyn Productions, Inc., supra, that (1) "the continuous operation of theaters specializing in pornographic presentations (obscene motion pictures). . . ." "is of a nature which, it could be found, 'affects at the same time an entire community,' " 118 Cal.Rptr. 428 at 431 and 434, and (2) that the "exhibition of the obscene material described in the complaint (time-motion studies of 10 films) constitutes a nuisance because it is 'indecent or offensive to the senses' in the sense in which those terms are used in the nuisance statutes'", and (3) that the allegations of the complaints were sufficient to bring the alleged activity of defendants within the definition of public nuisance and that . . . "Civil Code Sections 3479 and 3480 established plaintiffs' standing under section 731 of the Code of Civil Procedure to bring a civil action to enjoin the public nuisance involved".

On January 9, 1975, Petitioner, as the plaintiff in Civil Action 107347 filed a Notice of Motion for a Reconsideration of the Trial Court's December 19, 1974 Oral Ruling from the Bench on the Stipulated Demurrer and Plaintiffs' Motion

for a Preliminary Injunction in the consolidated cases, People of the State of California ex rel William Camil, City Attorney of the City of Duarte v. Buena Vista Cinema et al., CA 107347 and City of Duarte, A Municipal Corporation, and James J. Coughlin v. Buena Vista Cinema et al., CA 107771 and noticed the same for January 24, 1975.

On January 15, 1975, the Court of Appeal, Second Appellate District, notified Petitioner's counsel by a postcard that the Petition for a Writ of Mandate in People of the State of California ex rel William Camil, City Attorney of the City of Duarte, Petitioner vs. Superior Court of the State of California for the County of Los Angeles, Respondent and Buena Vista Cinema et al., Real Party in Interest; and City of Duarte, A Municipal Corporation and James J. Coughlin, Petitioner vs. Superior Court of the State of California for the County of Los Angeles, Respondent and Buena Vista Cinema et al., Real Party in Interest, L.A. 30396 (2d Civ. 45526) was denied.

On January 24, 1975, Los Angeles Superior Court Judge Max F. Deutz heard oral argument on the aforementioned Motion for Reconsideration in Civil Action 107347 and Civil Action 107771. At the conclusion of arguments, Judge Deutz ruled

that the Court did have jurisdiction of the two civil actions in the Trial Court below by reason of the failure to execute the written Order of Dismissal required by Civil Code of Procedure, Section 581(d) and ordered the Clerk not to file an Order of Dismissal but refused to act further on Petitioner's Motion for Preliminary Injunction and took the matter under submission. During the oral arguments on January 24, 1975, Judge Deutz indicated a general unwillingness to reset the matter for a hearing on the Motion for a Preliminary Injunction until the California Supreme Court should rule on the Petition for Hearing in Busch et al. v. Projection Room Theater, et al., supra.

On January 27, 1975, Petitioner herein filed a Petition for Hearing in the California Supreme Court on the Denial of the Petition for Writ of Mandate in People of the State of California ex rel William Camil, City Attorney of the City of Duarte, Petitioner, vs. Superior Court of the State of California for the County of Los Angeles, Respondent, and Buena Vista Cinema et al., Real Party in Interest; and City of Duarte, A Municipal Corporation and James J. Coughlin, Petitioners vs. Superior Court of the State of California for the County of Los Angeles, Respondent, and Buena Vista Cinema et al., Real Party in

Interest, L.A. 30396 (2d Civ. 45526). In said petition, Petitioner herein informed the California Supreme Court that, subsequent to the denial of the petition for Writ of Mandate by the Court of Appeal on January 15, 1975, trial court Judge Max F. Deutz had heard oral argument on Plaintiffs' Motion for Reconsideration and on January 24, 1975 had ordered the Clerk not to file an Order of Dismissal and had taken the matter under submission. On February 13, 1975, the Court denied the Petition for a Hearing.

On or about Feb. 27, 1975, the California Supreme Court handed down its order extending its jurisdiction to consider the Petition for Hearing in Busch et al. v. Projection Room Theater et al. for 30 days to March 27, 1975.

On February 21, 1975, the plaintiffs in Civil Action 107347 and Civil Action 107771 filed a second Notice of Motion for a Preliminary Injunction in People of the State of California ex rel William Camil, City Attorney of the City of Duarte v. Buena Vista Cinema et al., C.A. 107347 and City of Duarte, A Municipal Corporation and James J. Coughlin v. Buena Vista Cinema et al., C.A. 107771 and noticed the same for March 3, 1975 at 2:00 P.M.

On March 3, 1975, the Petitioner's Motions for a Preliminary Injunction in Civil Actions

107347 and 107771, came on for a rehearing before Judge Deutz in Department 54, with defense attorney Jonathan Lappen appearing for defendant Buena Vista Cinema and defendant Stephen E. Tillander. At such hearing, further exhibits were received into evidence, being time-motion studies of the 12 films exhibited at the Buena Vista Cinema subsequent to the first hearing on the motion for a preliminary injunction on December 19, 1974 up to and including March 3, 1975, the date of such hearing. (A list of said exhibits is attached hereto as Exhibit E.)

Upon the conclusion of the hearing on March 3, 1975, Judge Deutz sustained the Real Parties in Interest demurrers to the cause of action based upon the Red Light Abatement Act in City of Duarte, A Municipal Corporation and James J. Coughlin v. Buena Vista Cinema et al., C.A. 107771, without leave to amend. The Court also sustained the Real Parties in Interest's demurrer to the cause of action based upon Duarte City Ordinance No. 369 in People of the State of California ex rel William Camil, City Attorney of the City of Duarte v. Buena Vista Cinema et al., C.A. 107347, with leave to amend as to said cause of action. The Court held the complaint "sufficient to get your foot in the door (under Busch et al. v. Projection Room Theater et al., supra.)" but "(not) an

adequate complaint in order to go forward to trial." Judge Deutz also denied Petitioner's Motion for a Preliminary Injunction. Judge Deutz stated that ". . . the Court has expressed its opinion before from the time and motions study, I think it is quite clear that there is no redeeming social significance of any sort to these films and that they are obscene. I don't know what will happen on the trial of the case, but it is quite likely that an injunction will finally issue, but this is not the time or place for it. . . ." At the previous hearing on the motion for preliminary injunction on December 19, 1974, Judge Deutz said as to those 26 films ". . . from my preliminary observation it appears to me what we are dealing with here is definitely hard-core pornography. I haven't heard the sound tracks, and I haven't seen the actual motion picture film. But I have seen the timed sequences, and it is clear in my mind that this is probably hard-core pornography, but I am not making a finding on that because I haven't everything before me. . . ." When Counsel for Petitioner restated his argument that, were the Red Light Abatement Act applicable, "the mandate of the State Legislature would require relief to be granted on the motion for preliminary injunction", the Court answered "Well, I understand your point, but the Harmer case and the Busch case

both held that the Red Light Abatement Act didn't apply."

Pursuant to Los Angeles County Superior Court Judge Max Deutz' ruling of March 3, 1975, that Petitioner had stated a claim under Civil Code Sections 3479 and 3480, Petitioner herein, on March 10, 1975, filed its First Amended Complaint<sup>8/</sup> in People of the State of California ex rel William Camil, City Attorney of the City of Duarte, California vs. Buena Vista Cinema, being a building structure containing approximately 3,440 square feet (80' x 43'), located on real property commonly known as 1345 East Huntington Drive, Duarte, California; Stephen E. Tillander, dba Buena Vista Cinema; Diversified Realty Fund "A", a Limited Partnership; Title Insurance and Trust Company, a California corporation; Dunn Properties Corporation, a California Corporation; Jess Wilder; Inland Empire Enterprises, Inc., a California Corporation; Philip A. Fishman; North American Theatre Association, Inc., John Does 1 to 10, No. C-107347.

On April 3, 1975, Petitioner herein (People of the State of California ex rel William Camil,

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<sup>8/</sup> A copy of the First Amended Complaint in Civil Action 107347 is a part of the record herein as Appendix B-1 to the Petition (Third) for Writ of Mandate in 2d Civ. 46869 on file herein.

as City Attorney of the City of Duarte, California) again joined with others to file a second verified Petition for Writ of Mandate in the Court of Appeal in the same causes, entitled People of the State of California ex rel William Camil, City Attorney of the City of Duarte, Petitioner vs. Superior Court of the State of California for the County of Los Angeles, Respondent, and Buena Vista Cinema, et al., Real Party in Interest; and City of Duarte, A Municipal Corporation, and James J. Coughlin, Petitioner vs. Superior Court of the State of California for the County of Los Angeles, Respondent, and Buena Vista Cinema et al., Real Party in Interest, 2d Civ. No. 46061. Said petition sought an alternative and preemptory writ requiring the Los Angeles County Superior Court to show cause why it should not be required to vacate its order of March 3, 1975, which had denied the plaintiffs' Second Motion for a Preliminary Injunction and, upon a reconsideration of its original ruling on the defendants' demurrers, had again sustained the demurrers to the aforementioned causes of action pleaded in Civil Action 107347 (Duarte Ordinance No. 369) and Civil Action 107771 (Red Light Abatement Act). The Second Petition for a Writ of Mandate in this litigation (2d Civ. 46061) was denied by the Court of Appeal on April 8, 1975.

Petition for Hearing After Denial by the Court of Appeal was denied by the California Supreme Court on May 8, 1975.<sup>9/</sup>

On April 4, 1975, Real Parties in Interest, Stephen E. Tillander dba Buena Vista Cinema, Jess Wilder, Inland Empire Enterprises, Inc., Philip A. Fishman and North American Theatre Association, Inc., appeared by Attorney Jonathan Lappen and filed a demurrer to the First Amended Complaint in People of the State of California ex rel William Camil, City Attorney of the City of Duarte, California vs. Buena Vista Cinema, being a building structure containing approximately 3,440 square feet (80' x 43'), located on real property commonly known as 1345 East Huntington Drive, Duarte, California; Stephen E. Tillander, dba Buena Vista Cinema; Diversified Realty Fund 'A', a Limited Partnership; Title Insurance and Trust Company, a California Corporation; Dunn Properties Corporation, a California Corporation; Jess Wilder; Inland Empire Enterprises, Inc., a California Corporation; Philip A. Fishman; North American Theatre Association, Inc., John Does 1 to 10, Civil Action 107347 on the grounds that the Court has no jurisdiction of the subject of the cause

<sup>9/</sup> A copy of the Second Petition for Writ of Mandate in 2d Civ. 46061 is a part of the record herein as Exhibit 2 to the Petition (Third) for Writ of Mandate in 2d Civ. 46869 on file herein.

of action pleaded and that the pleading did not state facts sufficient to constitute a cause of action, and noticed the same for a hearing in Department 84 on April 17, 1975.

In their points and authorities the said Real Parties in Interest argued that, inasmuch as the California Supreme Court had granted a hearing in Busch et. al. v. Projection Room Theatre on March 10, 1975 (which date was seven days subsequent to the ruling of Superior Court Judge Max Deutz upholding Civil Action 107347 on the sole authority of Busch) under Rule 977 of the California Rules of Court, Busch was no longer controlling authority and the general demurrer to the first amended complaint must now be sustained on the grounds that Harmer v. Tonylyn Productions, Inc., 23 Cal. App.3d 941 was again the only ruling precedent.

At the hearing on the aforementioned demurrers before Los Angeles County Superior Court Judge August Goebel in Department 84 on April 17, 1975, petitioner argued that, at a minimum, the grant of a hearing in the Busch case also effectively removed any vestige that Harmer might have had as a binding precedent and that, in such case, the trial court must decide the matter anew under the rationale expressed in Busch or that expressed in Harmer. Against petitioner's objections, Los

Angeles County Superior Court Judge August Goebel placed the demurrer off calendar to await the Court's decision in Busch et al. v. Projection Room Theater et al., supra.

On May 2, 1975, Petitioner herein as the Plaintiff in People of the State of California ex rel William Camil, City Attorney of the City of Duarte, California v. Buena Vista Cinema, et al., C.A. No. 107347, filed a Notice of Appeal from Judge Deutz' Order dated March 12, 1975 denying Plaintiff's Motion for a Preliminary Injunction and sustaining the defendants' demurrer without leave to amend as to the claim based upon Duarte City Ordinance No. 369. On May 12, 1975, Petitioner filed a Notice to Prepare the Clerk's Transcript on such appeal.

Similarly, on May 2, 1975, the City of Duarte, A Municipal Corporation, and James J. Coughlin, as Plaintiffs and Appellants in City of Duarte, A Municipal Corporation and James J. Coughlin v. Buena Vista Cinema, et. al., C.A. No. 107771, filed a Notice of Appeal from Judge Deutz' order of March 3, 1975 denying Plaintiffs' Motion for Preliminary Injunction and from the Order of Dismissal pursuant to section 581.3 of the Code of Civil Procedure entered on March 3, 1975, following Superior Court Judge Max F. Deutz' sustaining defendants' demurrer, without leave to amend as

to the claim based upon Civil Code Sections 3479 and 3480 and Penal Code Sections 11225 et. seq., and on May 12, 1975 filed a Notice to Prepare the Clerk's Transcript in such appeal.

#### D. The Bankruptcy Action

On April 3, 1975, Curtis B. Danning, acting as Controller on behalf of United Professional Planning, Inc., Debtor and general partner of the limited partnership, Diversified Realty Fund "A" (real party in interest herein) filed a complaint in the United States District Court for the Central District of California entitled Curtis B. Danning, Controller, Plaintiff, v. City of Duarte, a Municipal Corporation; James J. Coughlin; People of the State of California, ex rel William Camil, City Attorney of the City of Duarte, California and James J. Clancy, Defendants, In re United Professional Planning, Inc., a California Corporation, Debtor and In re United Professional Enterprises, Inc., a California corporation, Debtor, No. 72-8654-R and No. 72-8653-R to enjoin the state court proceedings in C-107347 and C-107771. Hearings were conducted in the Bankruptcy Court in that matter on April 11, 1975 and May 8, 1975, in connection with Plaintiffs order to show cause why a

Preliminary Injunction should not be issued and Defendants' motion for dissolution of a temporary restraining order therein granted, on the grounds of lack of subject matter jurisdiction. On June 25, 1975, Bankruptcy Court Judge William J. Lasarow filed a Memorandum and Decision and Order in which he held that the Bankruptcy Court had no jurisdiction in the matter since the record title holder of the real estate involved, the limited partnership, Diversified Realty Fund "A", (and real party in interest herein), had never been officially adjudged a bankrupt or a debtor in the Bankruptcy Court. Judge Lasarow did exercise the Bankruptcy Court's limited emergency jurisdiction to restrain the defendants (Petitioner herein) for a period of 30 days until and including July 25, 1975 from proceeding in the State Court against the limited partnership, Diversified Realty Fund "A" (real party in interest herein) to permit the filing of a simple bankruptcy or debtor's petition as to the limited partnership, Diversified Realty Fund "A", by an interested party. Judge Lasarow held such filing to be a prerequisite to the Court's jurisdiction and a hearing by the Bankruptcy Court on the complaint to enjoin the state court action. On July 2, 1975, Curtis B. Danning and United Professional Planning, Inc., Debtor, filed a notice of appeal to the District Court

from the dismissal of Plaintiff's complaint to enjoin the State Court Prosecution. Said restraining order lapsed and later was reinstated and continued in effect by Judge Lasarow until Sept. 12, 1975, when another order was entered ordering that the said restraining order be dissolved as of 12:01 A.M. on Oct. 23, 1975. The decision of the bankruptcy court on Sept. 12, 1975 required Diversified Realty Fund "A" to appear in response to the State Court process which had been served on them on December 5, 1974. <sup>10/</sup>

E. Third Petition For Writ of Mandate in  
2d Civ. 46869.

On August 1, 1975, Petitioner herein filed its Third Petition for Writ of Mandate in the California Supreme Court under L.A. file No. 30497. Petitioner also lodged with said petition the following exhibits, which were pleaded by incorporation therein:

1. Exhibit 1 -- 8½" x 14" bound volume (blue) containing papers filed in First Petition for Writ of Mandate 2d Civ. 45526;
2. Exhibit 2 -- 8½" x 11" bound volume

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<sup>10/</sup> On Dec. 2, 1975, and against Petitioner's objections, the demurrer of Diversified Realty Fund "A" was also put off calendar.

(green) containing papers filed in Second  
Petition for Writ of Mandate 2d Civ. 46061;

3. Exhibit 3 -- Time-motion studies of 40  
programs (85 films) exhibited at the Buena Vista  
Cinema during the period July 15, 1974 - July 30,  
1975.

4. Exhibit 4 -- 8½" x 11" bound volume  
(green) containing original of deposition of  
North American Theatre Association, Inc. taken  
April 30, 1975 and adjourned on that date;

5. Exhibit 5 -- 8½" x 14" bound volume  
(blue) containing papers filed in U.S. District  
Court Bankruptcy Action Danning v. City of Duarte  
et al., No. 72-8654-R and 72-8653-R.

On August 4, 1975, the petition was trans-  
ferred to the Court of Appeal, Second District,  
and on Aug. 12, 1975 the petition was denied. On  
Aug. 19, 1975, petitioner filed a petition for  
hearing in the California Supreme Court which, on  
September 10, 1975 denied the same.

APPENDIX B

Minute Order of Superior Court  
Judge Norman Dowds, filed on  
August 2, 1976, denying Pe-  
titioner's motion for a  
preliminary injunction . . . . . B-1

SUPERIOR COURT OF CALIFORNIA, COUNTY OF LOS ANGELES

Date: AUG 02 1976 9:00 AM DEPT. LA 85  
 Honorable: NORMAN R DOWDS, Judge L SEABURY Deputy  
 Honorable: Judge Pro Tem Clerk  
 NONE Deputy Sheriff Y YAMADA Reporter

CI07347 Counsel for  
 CALIF PEOPLE-ET AL Plaintiff W CAMIL  
 BY: J. J. CLANCY  
 BUENA VISTA CINEMA- Counsel for  
 ETC-ET AL Defendant

Nature of Proceedings  
 MOTION FOR PRELIMINARY INJUNCTION

Petitioner's exhibits GGG through JJJJJ (Each a time motion study), KKKKK (Declaration of James J. Clancy), LLLLL (Declaration of Robert McGuire), MMMMM (Declaration of Robert Plassmeyer), NNNNN (Certified copy of Ordinance 398 City of Duarte), OOOOO (Copy of Resolution No. 76-28), PPPPP (Time motion study-program 89), and QQQQQ (Time motion study-program 90) are received in evidence.

Petitioner's exhibits A through QQ and SS through FFF, previously received in evidence, are read and considered by court for purpose of this application for preliminary injunction.

Robert S. Perry is sworn and testifies for petitioner.

Petitioner rests. Respondent has submitted.

Cause is argued.

Preliminary injunction is denied.

MINUTES ENTERED  
 Dept. LA 85  
 August 2, 1976  
 County Clerk

APPENDIX C

Court of Appeal, Second Appellate  
 District, Division Two,  
 Order dated September 1, 1976,  
 denying Petition for a Writ  
 of Certiorari and/or Mandate  
 in People ex rel. Camil v.  
Superior Court, 2d CIV  
 49376 . . . . . C-1

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA  
SECOND APPELLATE DISTRICT  
DIVISION TWO

PEOPLE OF THE STATE OF CALIFORNIA )  
ex rel. WILLIAM CAMIL, City Attorney) 2d CIV 49376  
of the City of Duarte, California, )

Petitioner,) ORDER

vs. )  
SUPERIOR COURT OF THE STATE OF )  
CALIFORNIA FOR THE COUNTY OF LOS )  
ANGELES, )

Respondent.) Second Dist.

) FILED

BUENA VISTA CINEMA, being a building) SEP 1 1976  
structure containing approximately ) Clay Robbins,  
3,440 square feet (80' x 43'), lo- ) Jr., Clerk  
cated on real property commonly )  
known as 1345 E. Huntington Drive, )  
Duarte, California; STEPHEN E. )  
TILLANDER, dba Buena Vista Cinema; )  
DIVERSIFIED REALTY FUND "A", a li- )  
mited partnership; TITLE INSURANCE )  
AND TRUST COMPANY, a California Cor- )  
poration; DUNN PROPERTIES CORPORA- )  
TION, a California Corporation; JOHN )  
DOES 1 to 10, )

Real Parties in Interest.)

THE COURT:

The petition for a writ of certiorari or mandate filed August 24, 1976, has been read and considered and is denied. Compton, J. was of the opinion that the petition for an alternative writ should have been granted.

APPENDIX D

Order of the California Supreme  
Court denying the petition  
for hearing . . . . . D-1

ORDER DUE  
October 1, 1976

ORDER DENYING HEARING  
AFTER JUDGMENT BY THE COURT OF APPEAL

2nd District, Division 2, Civil No. 49376

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA  
IN BANK

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PEOPLE ex rel CAMIL, ETC., PETITIONER

v.

THE SUPERIOR COURT OF LOS ANGELES COUNTY, RESPONDENT  
BUENA VISTA CINEMA, ETC., ET AL., REAL PARTIES IN  
INTEREST

---

SUPREME COURT  
FILED

Petition for hearing DENIED.

SEP 29, 1976

G. E. BISHEL, Clerk

Deputy

/s/ WRIGHT

Chief Justice

I, G. E. BISHEL, Clerk of the Supreme  
Court of the State of California, do  
hereby certify that the preceding is  
a true copy of an order of this Court,  
as shown by the records of my office.

Witness my hand and the seal of  
this Court this 23rd day of December,  
A.D. 1976.

Clerk

By: /s/ R. JOHNSON  
Deputy Clerk

APPENDIX E

Amendment I of the Constitution  
of the United States . . . . . E-1

Amendment V of the Constitution  
of the United States . . . . . E-1

Amendment X of the Constitution  
of the United States . . . . . E-1

AMENDMENT I

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances.

AMENDMENT V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use without just compensation.

AMENDMENT X

The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.

APPENDIX F

California Penal Code Section 311(a) defining  
"obscene matter" . . . . . F-1 - F-2

CALIFORNIA PENAL CODE

## Chapter 7.5

## §311. (Definitions)

As used in this chapter:

(a) "Obscene matter" means matter, taken as a whole, the predominant appeal of which to the average person, applying contemporary standards, is to prurient interest, i.e., a shameful or morbid interest in nudity, sex, or excretion; and is matter which taken as a whole goes substantially beyond customary limits of candor in description or representation of such matters; and is matter which taken as a whole is utterly without redeeming social importance.

(1) The predominant appeal to prurient interest of the matter is judged with reference to average adults unless it appears from the nature of the matter or the circumstances of its dissemination, distribution or exhibition, that it is designed for clearly defined deviant sexual groups, in which case the predominant appeal of the matter shall be judged with reference to its intended recipient group.

(2) In prosecutions under this chapter, where circumstances of production, presentation, sale, dissemination, distribution, or publicity indicate that matter is being commercially exploited by the defendant for the sake of its

prurient appeal, such evidence is probative with respect to the nature of the matter and can justify the conclusion that the matter is utterly without redeeming social importance.

APPENDIX G

California Civil Code, Sections 3479 and 3480, containing the provisions defining what constitutes a public nuisance . . . . .	G-1
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CALIFORNIA CIVIL CODE

## §3479. (Nuisance, what)

Anything which is injurious to health, or is indecent or offensive to the senses, or an obstruction to the free use of property, so as to interfere with the comfortable enjoyment of life or property, or unlawfully obstructs the free passage or use, in the customary manner, of any navigable lake, or river, bay, stream, canal, or basin, or any public park, square, street, or highway is a nuisance.

## §3480. (Public nuisance)

A public nuisance is one which affects at the same time an entire community or neighborhood, or any considerable number of persons, although the extent of the annoyance or damage inflicted upon individuals may be unequal.

APPENDIX H

California Code of Civil Procedure,  
 Section 731, authorizing the  
 City Attorney to prosecute  
 civil public nuisance abatement  
 actions when directed by the  
 City Council . . . . . H-1

CALIFORNIA CODE OF CIVIL PROCEDURE

§731. (Right to bring action to enjoin or abate nuisance, and to recover damages: Abatement of public nuisance)

An action may be brought by any person whose property is injuriously affected, or whose personal enjoyment is lessened by a nuisance, as the same is defined in section thirty-four hundred and seventy-nine of the Civil Code, and by the judgment in such action the nuisance may be enjoined or abated as well as damages recovered therefor. A civil action may be brought in the name of the people of the State of California to abate a public nuisance, as the same is defined in section thirty-four hundred and eighty of the Civil Code, by the district attorney of any county in which such nuisance exists, or by the city attorney of any town or city in which such nuisance exists, and each of said officers shall have concurrent right to bring such action for a public nuisance existing within a town or city, and such district attorney, or city attorney, of any county or city in which such nuisance exists must bring such action whenever directed by the board of supervisors of such county or whenever directed by the legislative authority of such town or city.

APPENDIX I

California Code of Civil Procedure,  
Section 527, containing the  
provisions relating to the  
granting of preliminary injunc-  
tions . . . . .

I-1 - I-3

CALIFORNIA CODE OF CIVIL PROCEDURE

§527. (Time of granting injunction: Service: Preliminary injunction, notice, readiness for hearing, continuance, counter-affidavits and precedence)

An injunction may be granted at any time before judgment upon a verified complaint, or upon affidavits if the complaint in the one case, or the affidavits in the other, show satisfactorily that sufficient grounds exist therefor. A copy of the complaint or of the affidavits, upon which the injunction was granted, must, if not previously served, be served therewith.

No preliminary injunction shall be granted without notice to the opposite party; nor shall any temporary restraining order be granted without notice to the opposite party, unless it shall appear from facts shown by affidavit or by the verified complaint that great or irreparable injury would result to the applicant before the matter can be heard on notice. In case a temporary restraining order shall be granted without notice, in the contingency above specified, the matter shall be made returnable on an order requiring cause to be shown why the injunction should not be granted, on the earliest day that the business of the court will admit of, but not later than 15 days or, if good cause appears to the court, 20 days from the date of such order.

When the matter first comes up for hearing the party who obtained the temporary restraining order must be ready to proceed and must have served upon the opposite party at least two days prior to such hearing, a copy of the complaint and of all affidavits to be used in such application and a copy of his points and authorities in support of such application; if he be not ready, or if he shall fail to serve a copy of his complaint, affidavits and points and authorities, as herein required, the court shall dissolve the temporary restraining order. The defendant, however, shall be entitled, as of course, to one continuance for a reasonable period, if he desire it, to enable him to meet the application for the preliminary injunction. The defendant may, in response to such order to show cause, present affidavits relating to the granting of the preliminary injunction, and if such affidavits are served on the applicant at least two days prior to the hearing, the applicant shall not be entitled to any continuance on account thereof. On the day upon which such order is made returnable, such hearing shall take precedence of all other matters on the calendar of such day, except older matters of the same character, and matters to which special precedence may be given by law. When the cause is at issue,

it shall be set for trial at the earliest possible date and shall take precedence of all other cases, except older matters of the same character, and matters to which special precedence may be given by law.

APPENDIX J

A photo-reduced copy of Ordinance No. 398, passed and adopted July 13, 1976. A true and correct copy of Ordinance No. 398 appears at Exhibit "2" to the "Petition for Writ of Certiorari And/Or, In The Alternative, Mandate, With Supporting Memorandum of Points and Authorities", on file with this Court as a part of the record herein . . . . . J-1 - J-6

J-1

ORDINANCE NO. 398

AN ORDINANCE OF THE CITY COUNCIL OF THE CITY OF DUARTE DECLARING THE COMMERCIAL EXPLOITATION OF LEWD MOTION PICTURE FILMS TO BE CONTRARY TO PUBLIC HEALTH, SAFETY AND GENERAL WELFARE AND A PUBLIC NUISANCE; AND DECLARING ANY PLACE DISPLAYING OR EXHIBITING SUCH LEWD MOTION PICTURE FILMS A PUBLIC NUISANCE; MAKING ALL LEWD MATTER POSSESSED IN SUCH PLACES A PUBLIC NUISANCE PER SE; AND PROVIDING FOR NOTICE AND PROCEEDINGS TO ABATE THE SAME AND FOR OTHER RELIEF.

THE CITY COUNCIL OF THE CITY OF DUARTE DOES ORDAIN AS FOLLOWS:

Section 1. PURPOSE AND EFFECT.

The City Council finds that the crass commercial exploitation of explicit sexual conduct through the public exhibition of lewd films constitutes a debasement and distortion of a sensitive key relationship of human existence, central to family life, community welfare and the development of human personality; is indecent and offensive to the senses and interferes with the comfortable enjoyment of life and property, in that such interferes with the interest of the public in the quality of life and total community environment, the tone of commerce in the City, property values, and the public safety; and that the continued operation of such activities is detrimental to the best health, safety, convenience, good morals and general welfare of the City of Duarte, and of the residents, citizens, inhabitants and businesses thereof. Pursuant to §§ 38771, 38773, and 38773.5 of the Government Code, § 731 of the Code of Civil Procedure, and §§ 3479, 3480, 3491 and 3494 of the Civil Code, the City Council hereby declares such activities to be a public nuisance, and herein establishes procedures for the abatement thereof. This Ordinance shall apply to existing establishments which are presently engaged in the type of activity herein declared to be a public nuisance.

Section 2. DEFINITIONS.

(A) "Lewd Film" means any motion picture film:

(1) which the average person, applying contemporary community standards, would find, when considered as a whole, appeals to the prurient interest; and

(2) which depicts or describes patently offensive representations or descriptions of:

(a) ultimate sexual acts, normal or perverted, actual or simulated; or

(b) masturbation, excretory functions, or lewd exhibition of the genitals or genital area.

Nothing herein contained is intended to include or proscribe any film which, when considered as a whole, and in the context in which it is used, possesses serious literary, artistic, political or scientific value.

(B) "Place" includes, but is not limited to, any building, structure, or place, or any separate part or portion thereof, whether permanent or not, or the ground itself.

(C) "Motion picture film" shall include any:

- (1) film or plate negative;
- (2) film or plate positive;
- (3) film designed to be projected on a screen for exhibition;
- (4) films, glass slides or transparencies, either in negative or positive form designed for exhibition by projection on a screen; and
- (5) videotape or any other medium used to electronically reproduce images on a screen.

(D) "Person" means any individual, partnership, firm, association, corporation, or other legal entity.

(E) "Knowledge" means having knowledge of the contents and character of the patently offensive sexual conduct which appears in such lewd film.

Section 3. LEWD FILMS AND THEATRES EXHIBITING THE SAME DECLARED A PUBLIC NUISANCE; ABATEMENT THEREOF.

(A) Any and every place in the City of Duarte where lewd films are publicly exhibited as a regular course of business, or possessed for the purpose of such exhibition; and any and every place in the City of Duarte where a lewd film is publicly and repeatedly exhibited, or possessed for the purpose of such exhibitions, is a public nuisance.

(B) Any and every lewd film which is publicly exhibited or possessed for such purpose at a place which is a public nuisance under Section 3(A) above, is a public nuisance per se.

Section 4. KNOWLEDGE OF NUISANCE PRESUMED FROM SERVICE OF COPY OF RESOLUTION; RESPONSIBILITY OF PARTIES THEREFOR; ABATEMENT OF SUCH NUISANCE.

(A) Upon receiving notice through service of a certified copy of this Ordinance and of a certified copy of the Resolution provided for herein, any and every person who shall own, legally or equitably, lease, maintain, manage, conduct, or operate a place in the City of Duarte which is declared to be a public nuisance as set forth and stated in Subsection (A) of this Section 3 is deemed to be a person who has knowledge of such nuisance for the purpose of this Ordinance and is, thereafter, responsible for its maintenance, and shall be liable therefor.

(B) The places and subject matter declared to be public nuisances under Section 3, shall be abated pursuant to Government Code §§ 38773 and 38773.5, Code of Civil Procedure § 731, and Civil Code §§ 3491 and 3494, as provided for herein.

Section 5. ACTION TO BE TAKEN BY CITY COUNCIL.

Upon a specific finding that a public nuisance, as defined in Section 3 of this Ordinance, exists in the City of Duarte, the City Council, in applying the provisions of this Ordinance to such nuisance, shall provide for the following by Resolution:

- (A) Declare the fact that such nuisance exists;
- (B) Set forth the description or legal

description and street address of the real property which constitutes the nuisance;

(C) Set forth a statement of facts upon which the City Council declaration of nuisance is based;

(D) Order the revocation of all licenses and permits which have been issued as a part of the operation of such business, subject to confirmation by the Court in the judicial proceedings required herein. Criminal proceedings for transacting business without a license at such address shall not be filed until the order of license revocation by the City Council has been confirmed by judicial order;

(E) Order all persons named in Section 4(A) hereof to summarily abate such public nuisances immediately, by terminating the exhibitions of such lewd film or films, or causing the same to be terminated, and voluntarily surrendering possession of the same to the Court having jurisdiction of the legal proceedings brought by the City Attorney pursuant to the provisions of this Ordinance, and notifying the City Clerk and City Council of compliance therewith by sworn affidavit;

(F) Order the City Attorney to proceed as directed in Section 6 of this Ordinance and do all things necessary to abate such public nuisance through judicial proceedings and to conclude such proceedings as expeditiously as is permissible under the law;

(G) Inform and give notice to persons named in Section 4(A) that:

(1) the City Council has determined that a public nuisance presently exists at such place and address, and has revoked the licenses and permits at that place, subject to Court confirmation, and that, under Section 4(A) of said Ordinance, they are deemed to have knowledge thereof and are responsible therefor;

(2) the City Council has ordered the City Attorney, as provided for under Section 6 hereof, to commence legal proceedings naming such persons as defendants in a civil action to abate the same judicially under Civil Code § 3494 and Code of Civil Procedure § 731, and to seek recovery in said action of the costs of abatement, including investigative costs, Court costs, attorney's fees, and other expenses;

(3) all lewd motion picture films being used in conducting and maintaining such public nuisance are considered to be contraband and the subject of forfeiture; and

(4) from and after service on the place or its manager or acting manager, or person then in charge of such place, of a certified copy of this Ordinance and a certified copy of such Resolution, any and all moneys paid as admission price to or for the exhibition or exhibitions of such lewd motion picture films are considered to be a public nuisance, as personal property used in conducting and maintaining such nuisance and, that a forfeiture of the same will be requested in the judicial proceedings required herein.

(H) Order that a certified copy of said Resolution and a certified copy of this Ordinance be delivered

forthwith in any manner normally used to effectuate personal service of process as directed in Code of Civil Procedure §§ 415.10 through 416.90, to all persons of record having any legal or equitable interest in the real property, and to the regular or acting manager or persons in charge of the place therein declared a public nuisance.

Section 6. ACTION TO BE TAKEN BY CITY ATTORNEY.

Upon a specific finding by Resolution of the City Council of the fact that a public nuisance exists at a particular location, the City Attorney shall:

(A) Forthwith, but not later than four working days after passage of said Resolution, commence legal proceedings under Civil Code §§ 3491 and 3494 and Code of Civil Procedure § 731, by the filing of a civil action seeking the following relief:

(1) An Order that the motion picture or pictures named by the City Council are lewd, as defined herein;

(2) An Order that the place named by the City Council where the film or films are being exhibited is a public nuisance and that the action taken by the City Council to revoke the licenses issued to that place of business was lawful;

(3) An injunction enjoining and restraining all persons maintaining said nuisance from exhibiting in public the named lewd films at any time in the future in the City of Duarte;

(4) An Order that all positive prints of the named lewd films be forfeited as contraband;

(5) An accounting of all moneys paid as admission price to or for the exhibition or exhibitions of such lewd motion picture films, from and after the time the persons maintaining said nuisance receive a copy of the Resolution of the City Council that the public nuisance exists, and a judgment that such moneys are a public nuisance;

(6) An Order that all admission price moneys or valuable consideration received and enumerated in the Court ordered accounting be forfeited to the general fund of the City of Duarte as contraband, or as property belonging to the City of Duarte;

(7) Judgment for the City of Duarte for all costs expended in abating the public nuisance, including investigative costs, Court costs, reasonable attorney's fees, and such other expenses as are provided for herein; and

(8) All other relief as the Court may deem proper.

(B) - File a notice of the pendency of the action in the office of the County Recorder of the County of Los Angeles, pursuant to Code of Civil Procedure § 409, giving the names of the parties, the object of the action, and a description of the property thereby affected.

Section 7. SEVERABILITY CLAUSE.

If any Court shall determine that any word, clause, phrase, sentence, paragraph, or subsection of this Ordinance is unconstitutional as worded, the Court shall first attempt to construe or interpret such unconstitutional provision so/as to enable the same to be constitutional as so narrowed or construed. If the Court cannot so limit or construe such word or provision narrowly so as to render same constitutional, it shall strike or modify only the minimum number of words, phrases, clauses, sentences, or paragraphs as will be absolutely necessary to render the remainder constitutional. In no case shall a subordinate clause or phrase or word render its attached major section or provision unconstitutional, but instead shall be severed therefrom entirely, unless such severance renders the remainder wholly meaningless or unconstitutional.

Section 8. SUPERSEDES PRIOR ORDINANCE.

This Ordinance supersedes Ordinance No. 369, adopted on November 12, 1974. However, the adoption of this Ordinance and the repeal of said Ordinance No. 369 shall not in any manner affect the prosecution for violations of Ordinance No. 369, which violations were committed prior to the effective date of this Ordinance.

Section 9. URGENCY CLAUSE.

Pursuant to the provisions of Subsection (b) of § 36937 of the Government Code of the State of California, this Ordinance is for the immediate preservation of the public peace, health, and safety and shall take effect immediately. The facts constituting the urgency are as follows:

The purpose of this Ordinance, as is evident from its content, is to enable the City of Duarte to abate the type of public nuisance being committed within the City. The City Council deems the showing of lewd films, as defined herein, as being a public nuisance contrary to the public peace, health and safety of the City and its residents. This Ordinance makes certain changes in previously adopted and effective Ordinance No. 369 required by the decision of the California Court of Appeal in People ex rel. Camil v. Buena Vista Cinema, 129 Cal.Rptr. 315. The City Council deems it necessary for the immediate preservation of the public peace, health and safety that immediate action be taken to abate said public nuisance pursuant to the terms of this Ordinance.

PASSED and ADOPTED this 13th day of July, 1976, the following called vote:

AYES: Councilmen: Coughlin, Anderson, Montgomery, Falkenberg

NOES: Councilmen: Watson

ABSENT: Councilmen: None

/s/ Carlyle W. Falkenberg  
MAYOR

ATTEST:

CITY CLERK  
J. Kenneth Caresio

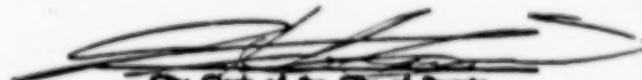
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STATE OF CALIFORNIA  
COUNTY OF LOS ANGELES }  
CITY OF DUARTE

APPENDIX K

I, J. KENNETH CARESIO, City Clerk of the City of Duarte, County of Los Angeles,  
State of California, hereby certify that the foregoing Ordinance No. 398  
was regularly adopted by the City Council of said City of Duarte at a  
regular meeting of said Council held on the 13th day of July 1976  
by the following vote:

AYES:	Councilmen Coughlin, Anderson, Montgomery, Falkenberg
NOES:	Councilman Watson
ABSENT:	Councilman None

  
City Clerk of the City of Duarte

A photo-reduced copy of Resolution No. 76-28, passed and adopted July 13, 1976. A true and correct copy of Resolution No. 76-28 appears at Exhibit "2" to the "Petition for Writ of Certiorari And/Or, In The Alternative, Mandate, With Supporting Memorandum of Points and Authorities", on file with this Court as a part of the record herein. . . K-1 - K-14

RESOLUTION NO. 76-28

A RESOLUTION OF THE CITY COUNCIL OF THE CITY OF DUARTE DETERMINING THAT THE REAL PROPERTY AND ACTIVITY KNOWN AS THE "BUENA VISTA CINEMA," LOCATED AT 1345 EAST HUNTINGTON DRIVE, DUARTE, CALIFORNIA, 91010, IS IN VIOLATION OF SECTION 3 OF ORDINANCE NO. 398 OF THE CITY OF DUARTE; DECLARING SUCH ACTIVITY TO BE A PUBLIC NUISANCE; REVOKING ALL LICENSES AND PERMITS, AND ORDERING ABATEMENT; AND ORDERING THE CITY ATTORNEY TO TAKE ALL STEPS NECESSARY TO COMPLY WITH SECTION 6 OF ORDINANCE NO. 398.

THE CITY COUNCIL OF THE CITY OF DUARTE DOES DECLARE AND RESOLVE AS FOLLOWS:

Section 1. Pursuant to Section 38771 of the Government Code which authorizes the City Legislative Body to declare by Ordinance what constitutes a nuisance, the City Council of Duarte did, on the 10th day of September, 1974, adopt Ordinance No. 367, which became effective on the 12th day of October, 1974, and did supersede the same with Ordinance No. 369, adopted as an urgency Ordinance on the 12th day of November, 1974, and did supersede Ordinance No. 369 with Ordinance No. 398, adopted as an urgency Ordinance on the 13th day of July, 1976, to become effective immediately upon adoption. Said Ordinance declares:

(A) Any and every place in the City of Duarte where lewd films are publicly exhibited as a regular course of business, or possessed for the purpose of such exhibition; and any and every place in the City of Duarte where a lewd film is publicly and repeatedly exhibited, or possessed for the purpose of such exhibition, to be a public nuisance.

(B) Any and every lewd film which is publicly exhibited or possessed for such purpose at a place which is a public nuisance under (A) above, to be a public nuisance per se.

(C) From and after service on the place, or its manager, or acting manager, or person then in charge

of such place, of a certified copy of Ordinance No. 398, and a certified copy of the Resolution authorized by said Ordinance, all moneys paid thereafter as admission price to such exhibitions are also a public nuisance, as personal property used in conducting and maintaining a declared public nuisance.

(D) Upon receiving notice through service of a certified copy of Ordinance No. 398 and of a certified copy of the Resolution authorized by said Ordinance, any and every person who shall own, legally or equitably, lease, maintain, manage, conduct, or operate a place in the City of Duarte where lewd films are publicly exhibited, or possessed for the purpose of such exhibition in the regular course of business, or where a single lewd film is publicly and repeatedly exhibited, or possessed for the purpose of such exhibition, is deemed to be a person who has knowledge of such nuisance for purposes of said Ordinance and this Resolution and is, thereafter, responsible for its maintenance, and shall be liable therefor.

Section 2. Pursuant to the provisions of Ordinance No. 398, the City Council of Duarte makes the following findings of fact concerning the identity of the motion picture films which have been and are being exhibited at the "Buena Vista Cinema":

(A) Upon the instructions of the Duarte City Attorney, a continuous surveillance of the films being exhibited at the Buena Vista Cinema has been maintained, which surveillance shows that, during the two-year period from July 15, 1974 through July 13, 1976, approximately 88 programs have been exhibited at said theater with each program containing two or more motion picture films. The titles of the films exhibited at each of

the 88 programs and the approximate playing date of each is set forth in Enclosure A to this Resolution.

(B) Photographic time-motion studies of the 72 motion picture films exhibited at the "Buena Vista Cinema" during the eight-month period from Nov. 6, 1975 through July 5, 1976, being programs 54 through 88 described in Enclosure A, have been prepared and have been filed with the City Council, and the members of the City Council have examined the photographic content in each of such time-motion studies.

Section 3. Pursuant to the provisions of Ordinance No. 398, and based upon the evidentiary facts referred to in Section 2 above, the City Council of Duarte makes the following findings of fact concerning the character and nature of the aforementioned motion picture films which have been, and are being, exhibited at the "Buena Vista Cinema":

(A) Each of the aforementioned 72 motion picture films which have been exhibited at the "Buena Vista Cinema" as a part of programs 54 through 88, is a lewd film as defined in Section 2(A) of Ordinance No. 398, in that (1) the average person, applying contemporary community standards, would find that, when considered as a whole, said film appeals to the prurient interest, and (2) said film depicts and describes patently offensive representations and descriptions of ultimate sexual acts, and (3) said film possesses no serious literary, artistic, political, or scientific value. The patently offensive representations and descriptions which are referred to are depicted on the individual photographs of the 72 time-motion studies which have been examined by the City Council, and such studies are incorporated herein by reference.

Section 4. All licenses and permits which have been issued as a part of the operation of the "Buena Vista Cinema" are hereby revoked, subject to confirmation by the Court, in judicial proceedings required herein. Criminal proceedings for transacting business without a license at the "Buena Vista Cinema" shall not be filed until the order of license revocation by the City Council has been confirmed by judicial order.

Section 5. Pursuant to the provisions of Ordinance No. 398, and based upon evidentiary facts contained in the business records of the City of Duarte and already on file with the City Council in other matters pertaining to the "Buena Vista Cinema", which are incorporated herein by reference as though set forth herein in full, the City Council of Duarte makes the following findings of fact with respect to the place commonly known as the "Buena Vista Cinema":

(A) There is presently located in the City of Duarte a motion picture business commonly known as the "Buena Vista Cinema" doing business upon real property known as 1345 East Huntington Drive, Duarte, County of Los Angeles, California. Such real property is further described on the preliminary plot plan dated April 8, 1968, of the "Tentative Lot Split Map" for Lot Split No. 60, covering a portion of the West 1/2 of Lot 12, Section 30, Township 1, North, Range 10 West, Rancho Azusa de Duarte, M R 6-80 on file in the Planning Department of the City of Duarte and is shown thereon as a building area, approximately 80 feet x 43 feet, containing approximately 3440 square feet, located near the easterly boundary on said map and approximately 60 feet north of Huntington Drive.

(B) The motion picture business commonly known as the "Buena Vista Cinema" located at 1345 East Huntington

Drive, Duarte, California, is a public nuisance, being a place where lewd films are publicly exhibited, and possessed for the purpose of such exhibition, as a regular course of business.

(C) JOHN DOE 1 is the Lessee of the real property commonly known as the "Buena Vista Cinema."

(D) Diversified Realty Fund "A", a limited partnership of 2009 East Edinger Avenue, Santa Ana, California, is the owner of the real property commonly known as the "Buena Vista Cinema", 1345 East Huntington Drive, Duarte, California, as shown on the deed recorded as document No. 689 on April 5, 1972.

(E) Dunn Properties Corp. of 2009 East Edinger Avenue, Santa Ana, California, is the owner of a security interest in such real property, as shown on the trust deed recorded as document No. 690 on April 5, 1972.

(F) JOHN DOE 2 is the operator, JOHN DOE 3 is the manager, and JOHN DOE 4 is the acting manager or person in charge of the establishment commonly known as the "Buena Vista Cinema", 1345 East Huntington Drive, Duarte, California.

Section 6. Diversified Realty Fund "A", a limited partnership, Dunn Properties Corp., and JOHN DOES 1 through 4, and all other persons of record, having legal or equitable title in the real property known as 1345 East Huntington Drive, Duarte, California, on which is located the motion picture business commonly known as the "Buena Vista Cinema" are:

(A) hereby informed and given notice that (1) the City Council has determined that a public nuisance exists on the property located at 1345 East Huntington Drive, Duarte, California; namely, the "Buena Vista Cinema", and that, under Section 4(A) of said Ordinance, they

are responsible therefor upon receiving notice through service of a certified copy of the Ordinance and a certified copy of this Resolution, and (2) any and all licenses and permits heretofore issued for the premises known as 1345 East Huntington Drive are hereby revoked under the provision set forth in Section 5(D) of Ordinance No. 398; and

(B) hereby ordered, under Government Code Section 38773 and Section 5(E) of Ordinance No. 398, to summarily abate the abovementioned public nuisances immediately, by terminating, or causing to be terminated, the exhibition of the above described lewd films and to voluntarily surrender possession of the same to the Court having jurisdiction of the legal proceedings which the City Attorney has been ordered to institute under Section 6 of Ordinance No. 398. Each of the abovementioned persons shall notify the City Council of Duarte by sworn affidavit of his compliance with this Order of Summary Abatement, as required by Section 5(E) of said Ordinance.

Section 7. Diversified Fund Realty "A", a limited partnership, Dunn Properties Corp., and JOHN DOES 1 through 4, and all other persons of record, having legal or equitable title in the real property known as 1345 East Huntington Drive, Duarte, California, on which is located the motion picture business commonly known as the "Buena Vista Cinema", are hereby informed and given notice that:

(A) under Sections 5(F) and 6 of said Ordinance, the City Attorney has been ordered to institute legal proceedings under Civil Code Sections 3491 and 3494, and Civil Procedure Code Section 731, naming them as defendants in an action to abate the same, and to seek

restitution for the costs of abatement, including:

- (1) investigative costs;
- (2) Court costs;
- (3) reasonable attorney's fees arising out of preparations for and trial of the cause, and appeals therefrom; and
- (4) printing costs of trial and appellate brief, and all other papers filed in such proceedings.

(B) All positive prints of the above described 70 lewd films are considered to be contraband and the subject of forfeiture as provided for in Section 5(G)3 of Ordinance No. 398.

(C) From and after service on the place or its manager, or acting manager, or person then in charge of such place, of a certified copy of Ordinance No. 398, and a certified copy of this Resolution, any and all moneys paid thereafter as admission price to the exhibition of such lewd films are considered to be a public nuisance as personal property used in conducting and maintaining such nuisances, and that a forfeiture of the same will be requested in the judicial proceedings required by Ordinance No. 398.

Section 8.

(A) The City Attorney is hereby ordered to provide for delivery of a certified copy of this Resolution and a certified copy of Ordinance No: 398 in any manner normally used to effectuate personal service of process as directed in Code of Civil Procedure, Sections 415.10 through 416.90 to Diversified Realty Fund "A", a limited partnership, Dunn Properties Corp., and John Does 1 through 4, and to all other persons of record having

any legal or equitable interest in the real property, known as 1345 East Huntington Drive, Duarte, California, on which is located the motion picture business commonly known as the "Buena Vista Cinema"; and to the manager or acting manager or persons in charge of said establishment.


(B) The City Attorney is hereby ordered to proceed as directed in Section 6 of Ordinance No. 398, and to take all steps and do all things necessary to abate such nuisances and obtain the relief designated therein, through the judicial proceedings specified therein, including but not limited to seeking such recovery in the pending lawsuit entitled People ex rel. Camil, City Attorney of Duarte, v. Buena Vista Cinema, et al.

PASSED and ADOPTED this 13th day of July, 1976.

/s/ Carlyle W. Falkenberg

MAYOR  
Carlyle W. Falkenberg

ATTEST:

  
CITY CLERK  
J. Kenneth Caresio

STATE OF CALIFORNIA )  
COUNTY OF LOS ANGELES ) ss.  
CITY OF DUARTE )

I, J. KENNETH CARESIO, CITY CLERK OF THE CITY OF DUARTE, County of Los Angeles, State of California, hereby certify that the foregoing Resolution No. 76-28 was regularly adopted by the City Council of said City of Duarte at a regular meeting of said Council held on the 13th day of July, 1976 by the following called vote:

AYES: Councilmen: Coughlin, Montgomery, Falkenberg, Anderson,  
NOES: Councilman: Watson  
ABSENT: Councilmen: None

  
City Clerk J. Kenneth Caresio

CODE	FEATURE	FRAMES	DATE
1	1) Devil in Miss Jones 2) Deep Throat	1365	7/15/74
2	1) Chambermaids 2) Souzy's House	1533	8/01/74
3	1) The Hardy Girls 2) Untitled Companion Feature	1408	8/23/74
4	1) Blue Balloon 2) The Medallion	1509	9/06/74
5	1) Easy Pickup 2) Badge 69	1476	9/20/74
6	1) Armed Services 2) Hungry Hypnotist	1360	10/02/74
7	1) Touch Me 2) 69 Sunset Strip	1637	10/09/74
8	1) Revolving Teens 2) Tycoon's Daughter	1199	10/10/74
9	1) Hungry Girls 2) Untitled Companion Feature	1220	10/20/74
10	1) Easy Money 2) My Husband the Producer	1325	10/31/74
10A	1) My Husband the Producer 2) 5 Minutes - coming attractions	707	11/06/74
11	1) After School Exams 2) Gina, the Foxy Chick	940	11/14/74
12	1) The Cheaters 2) Busy Bodies	1266	12/03/74
13	1) Johnny Wadd 2) Johnny Wadd in The Blonde in Black Lace	1631	12/12/74
14	1) Flesh of the Lotus 2) Tropic of Passion 3) Previews	1633	1/07/75
15	1) Love Witch 2) Certified Mail	1759	1/09/75
16	1) Untitled feature 2) Pistolero	1387	1/20/75

Enclosure A-1

K-10

CODE	FEATURE	FRAMES	DATE
17	1) Hawaii Sex O 2) Wanda's Education	1846	1/23/75
18	1) Wet Lips 2) Untitled feature	1696	2/06/75
19	1) If Mother Could See Me Now 2) Untitled (Liars)	1463	2/20/75
20	1) Untitled 2) Untitled 3) Mr. Peepers & the Vacuum Sweeper	1393	3/16/75
21	1) Teaching Uncle Henry 2) The Search	1050	3/17/75
22	1) Untitled 2) Who Killed Cock Robin 3) Jeanie's Magic Box 4) Untitled 5) Dr. Mark From Denmark	3089	3/21/75
23	1) The Oldest Profession 2) The Girl From AUNTIE (Jane Bond)	1796	3/27/75
24	1) Twilight Cowboy 2) Untitled	1722	4/04/75
25	1) Untitled 2) The Hit	1245	4/10/75
26	1) Untitled 2) The Medical Plaza	1760	4/17/75
27	1) Cows, Horses, Goats & Things 2) Gratitude 3) Blackmail for Daddy	1595	4/24/75
28	1) Previews of "A Hard Bargain" 2) Ski Ball 3) Untitled (Revolution Theme)	1481	5/01/75
29	1) "A Hard Bargain" 2) "Lollypop for Judy"	1686	5/08/75
30	1) Untitled 2) The Groupies	1689	5/15/75
31	1) Its All In The Mind 2) Broadside	1290	5/22/75

Enclosure A-2

K-11

CODE	FEATURE	FRAMES	DATE
32	1) Genies Magic Box 2) How To Do It	1544	5/29/75
33	1) Untitled 2) The Housewarming	1335	6/05/75
34	1) Untitled 2) Teen Sorority Girls	1593	6/12/75
35	1) Nine Loops Three Reels 2) Untitled	1551	6/19/75
36	1) Motel Love 2) Untitled	1293	6/28/75
37	1) Kowloon Connection 2) Untitled	1326	7/03/75
38	1) El Hombre (726) only 2) Kowloon Connection		7/10/75
39	1) Untitled (The Inheritance) 2) Episodes of an Oriental Kitten	1533	7/17/75
40	1) Untitled 2) Big Bad Beulah	1514	7/26/75
41	1) Natties Pleasure Palace 2) Untitled		8/01/75
42	1) Untitled 2) Sex Delivery		8/20/75
43	1) Traveling 2) Untitled		8/22/75
44	1) Gloria Comes Home 2) Untitled "Sex on a Waterbed" 3) The Cure		8/30/75
45	1) Tail of a Bearded Clam 2) Piece of the Action	1657	9/07/75
46	1) Untitled (The Search) 2) Illegal Entry	1685	9/13/75
47	1) "Once in a Lifetime" 2) "Ski Bunnies"		9/20/75
48	1) "The Married Woman" and coming attractions for "The Most Valuable Pussy" 2) "Getting It On" and coming attractions for "The Devils Due."		9/28/75

Enclosure A-3

K-12

CODE	FEATURE	FRAMES	DATE
49	1) Most Valuable Pussy 2) Sexual Awareness		10/04/75
50	1) The Devils Due 2) Possessed		10/11/75
51	1) My Sister My Love 2) The Fugitive		10/18/75
52	1) Black Neighbors 2) Little Girl Blue		10/24/75
53	1) Birthday Babe (Untitled) 2) Sex Is My Bag		10/30/75
54	1) Untitled (Honeymoon Suite) 2) All in the Sex Family	1714	11/06/75
55	1) Black Girls 2) The Passion Palace	1424	11/13/75
56	1) "For the Love of Money" 2) Untitled	1825	11/20/75
57	1) The Agony of Lace, Lash & Love 2) My Husband the Producer	1744	11/30/75
58	1) The Contest 2) Hallucinations	1716	12/04/75
59	1) A W O L 2) Double Exposure	1522	12/11/75
60	1) 5 Hour festival of 2) Eight Short features	2022	12/18/75
61	1) Lacy Bodine 2) A Star is Born	1662	12/28/75
62	1) Untitled (Sheri) 2) Repeat feature not shot	677	1/02/76
63	1) "Nicole, the Story of 'O'" 2) Untitled (Motel Love)	1679	1/09/76
64	1) Untitled (Dr. Cocklove) 2) "Funky World of Adult Cartoons"	1810	1/15/76
65	1) Untitled "Switchcraft" 2) "Winnabango"	1778	1/23/76

Enclosure A-4

K-13

CODE	FEATURE	FRAMES	DATE
66	1) Untitled "The Organ Player" 2) "Teenage Cover Girl"	1692	1/30/76
67	1) Untitled "Captive Love" 2) "Twice is Not Enough"	1373	2/05/76
68	1) Proposition 8 2) Wet Wilderness	1450	2/15/76
69	1) Flossie - Previews 2) The Hippie Hooker	1481	2/19/76
70	1) Untitled (Harry Hard) 2) Untitled (The Magnificent Voyeur)	1536	2/26/76
71	1) Devil in Miss Jones 2) Deep Throat	1449	3/04/76
72	1) Titled "Savage Lust" 2) Untitled (Waltz of the Bats)	1702	3/18/76
73	1) Young and Abused 2) Untitled (Black on White)	1641	3/27/76
74	1) Untitled (Twilight Cowboy) 2) Hawaii Sex O	1511	4/01/76
75	1) Hollywood U. S. A. 2) Ante Up or Deal	1709	4/08/76
76	1) The School Teachers 2) All in the Sex Family	1548	4/19/76
77	1) The Cheaters 2) Hard Time at the Employment Office	1811	4/22/76
78	1) Love Lust Life 2) Coming West	902	5/04/76
79	1) Getting It On 2) The Lucky Swingers	1331	5/11/76
80	1) Innocent Couple 2) Twice is Not Enough	1474	5/18/76
81	1) Untitled (only feature shot)	771	5/21/76
82	1) All in the Sex Family 2) Flossie Head	1553	5/23/76
83	1) The Surprised Coed 2) The Hungry Hypnotist	1380	6/01/76

Enclosure A-5

# K-14

<u>CODE</u>	<u>FEATURE</u>	<u>FRAMES</u>	<u>DATE</u>
84	1) Indianapolis 500 2) Hell's Kitchen	1375	6/04/76
85	1) The Boys in the Band 2) Little Girl Blue	1747	6/10/76
86	1) Bananas 2) Executive Suite	1574	6/20/76
87	1) Film Festival 2) 6 Untitled reels	1854	6/26/76
88	1) Keyhole Poker - Untitled 2) Coming west	1322	7/05/75

Enclosure A-6